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AUTHOR OF CRIMINAL PROCEDURE CODE, GUARDIANS AND WARDS ACT,
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ABBREVIATIONS

(*English Reports.*)

A. C. or App. Cas	..	Law Reports, Appeal Cases.
A. & E.	..	Adolphus and Ellis's Reports, King's Bench.
Amb.	..	Ambler's Reports, Chancery.
Anst	..	Anstruther's Reports, Exchequer.
Atk	..	Atkyns' Reports, Chancery.
Barn. Ch.	..	Barnardiston's Reports, Chancery.
B. & Ad.	..	Barnewall and Adolphus' Reports, King's Bench.
B. & Ald.	..	Barnewall and Alderson's Reports, King's Bench.
Ball. & B.	..	Ball and Beatty's Reports (Ireland).
B. & C.	..	Barnewall and Cresswell's Reports, King's Bench.
B. & S.	..	Best and Smith's Reports, Queen's Bench.
Beav.	..	Beavan's Reports, Rolls Court.
Bing.	..	Bingham's Reports, Common Pleas.
Bing. N. C. or N. S.	..	Bingham's New Cases, Common Pleas.
Bli.	..	Bligh's Reports, House of Lords.
Bo. & Pul.	..	Bosanquet and Puller's Reports, Common Pleas.
Boul.	..	Boulnois' Reports.
Bourke	..	Bourke's Reports.
Br. C. C.	..	Brown's Chancery Cases.
Br. P. C.	..	Brown's Parliamentary Cases.
Brow. & Lush.	..	Browning and Lushington's Reports.
Camp.	..	Campbell's Reports.
C. B.	..	Common Bench Reports.
C. B. (N. S.)	..	Common Bench (New Series).
C. P.	..	Common Pleas.
C. & J.	..	Cromton and Jervis' Reports, Exchequer.
C. & M.	..	Crompton and Meeson's Reports, Exchequer.
C. M. & R.	..	Crompton, Meeson and Roscoe's Reports, Exchequer.
C. & P.	..	Carrington and Payne's Reports, Nisi Prius.
Ch. or Ch. D.	..	Law Reports, Chancery Division.
Ch. R.	..	Reports in Chancery.
Cowp.	..	Cowper's Reports, King's Bench.
Coll.	..	Collyer's Reports, Chancery.
Co. Rep.	..	Coke's Reports.
C. P. D.	..	Law Reports, New Series, Common Pleas Division.
Cox.	..	Cox's Reports, Chancery.
Cr. & J.	..	Crompton and Jervis' Reports, Exchequer.
Cro. Eliz	..	Croke's Reports (Elizabeth).
Cro. Jac.	..	Croke's Reports (James I).
D. & C.	..	Deacon and Chitty's Reports.
DeG. & J.	..	DeGex & Jones' Reports.
DeG. F. & J.	..	DeGex, Fisher and Jones' Reports.
DeG. J. & S.	..	DeGex, Jones and Smith's Reports.
DeG. M. & G.	..	DeGex, Macnaghten and Gordon's Reports.
DeG. & S.	..	DeGex and Smale's Reports, Chancery.
Dick.	..	Dickens' Reports, Chancery.
Doug.	..	Douglas' Reports, Queen's Bench.
Dow. & Cl.	..	Dow and Clark's Reports.
Dowl.	..	Dowling's Reports.
Dowl. & L.	..	Dowling and Lowndes' Bail Court Reports.
Dr. or Drew	..	Drewry's Reports, Chancery.
Dr. & Sm.	..	Drewry and Smale's Reports, Chancery.
Dr. & War	..	Drewry and Warren's Chancery Reports (Ireland).
Durn. & East	..	Dunford and East or Term Reports,

East ..	East's Reports, King's Bench.
Eden ..	Eden's Reports.
E. & B. ..	Ellis and Blackburn's Reports, Queen's Bench.
E. B. & E. ..	Ellis, Blackburn & Ellis' Reports, Queen Bench.
E. & E. ..	Ellis and Ellis' Reports, Queen's Bench.
Eq. ..	Equity Reports.
Eq. Ca. Abr. ..	Equity Cases Abridged.
Esp. ..	Espinasse's Reports.
Exch. or Ex. ..	Exchequer Reports.
Ex D. ..	Law Reports, Exchequer Division.
Finch. ..	Finch's Reports.
Free. ..	Freeman's Reports, Chancery.
Giff. ..	Giffard's Reports, Chancery.
Hare ..	Hare's Reports, Chancery.
H. & C. ..	Hurlstone and Coltman's Reports.
H. & M. ..	Hemming and Miller's Reports.
H. & N. ..	Hurlstone and Norman's Reports, Exchequer.
H. L. C. ..	Law Reports, House of Lords Cases.
H. Bl. ..	Henry Blackstone's Reports, Common Pleas.
Holt. Eq. ..	Holt's Equity Reports.
Holt. N. S. ..	Holt's Nisi Prius Reports.
Ir. Eq. R. ..	Irish Equity Reports.
Jac. ..	Jacob's Reports.
J. & W. ..	Jacob and Walker's Reports, Chancery.
John. ..	Johnson's Reports, Chancery.
J. & H. ..	Johnson and Hemming's Reports, Chancery.
Jo. & Lat. ..	Jones and Latouche's Reports (Ireland).
K. B. ..	Law Reports, King's Bench Division.
Kay & J. ..	Kay and Johnson's Reports, Chancery.
Keen ..	Keen's Reports, Rolls Court.
Knapp. ..	Knapp's Reports, Privy Council.
Leon ..	Leonard's Reports, King's Bench.
L J. ..	Law Journal Reports.
L. J. (N. S.) ..	" " " (New Series).
L. J. Ch. ..	" " " Chancery.
L. R. Ch. ..	Law Reports, Chancery.
L. R. C. P. ..	" " Common Pleas.
L. R. Eq. ..	" " Equity Cases.
L. R. Exch. ..	" " Exchequer.
L. R. H. L. C. ..	" " House of Lords Cases.
L. R. P. C. ..	" " Privy Council.
L. R. Q. B. ..	" " Queen's Bench Cases.
L. T. ..	Law Times Reports
M. & C. ..	Mylne and Craig's Reports.
M. & G. ..	Macnaghten and Gordon's Reports.
Man. & G. ..	Manning and Granger's Reports, Common Pleas.
Man. & R. ..	Manning and Ryland's Reports.
M. & K. ..	Mylne and Keene's Reports.
M. & P. ..	Moore and Payne's Reports.
M. & S. ..	Maule and Selwyn's Reports.
M. & W. ..	Meeson and Welsby's Reports.
Maddock ..	Maddock's Reports, Chancery.
Mer. ..	Merivale's Reports, Chancery.
Mont. ..	Montagu's Reports.
M. D. & DeG. ..	Montagu, Deacon and DeGex's Reports.
Mood. ..	Moody's Chancery Cases.
Moo. P. C. ..	Moore's Privy Council Reports.
My. & Cr. ..	Mylne and Craig's Reports, Chancery.
N. & M. ..	Neville and Manning's Reports.
N. & P. ..	Neville and Perry's Reports.
P. Wms. ..	Peere Williams' Reports, Chancery.
Pea. N. P. ..	Peake's Nisi Prius Reports.
Ph. ..	Philip's Reports, Chancery.
Q. B. ..	Adolphus and Ellis' Queen's Bench Reports.
Q. B. D. ..	Law Reports, Queen's Bench Division.

R. & M. ..	..	Russell and Mylne's Reports, Chancery.
R. R. ..	..	Revised Reports.
Roll. ..	..	Rolle's Reports.
Russ. ..	..	Russell's Reports, Chancery.
Sch. & Lef. ..	..	Schoales and Lefroy's Reports.
S. L. C. ..	..	Smith's Leading Cases.
Sel. Ca. Ch. ..	..	Select Cases in Chancery.
Sim. ..	..	Simon's Reports, Chancery.
Sim. & St. ..	..	Simon and Stuart's Reports.
Sm. & Giff ..	..	Smale and Giffard's Reports.
Stark. ..	..	Starkie's Reports.
Swan. ..	..	Swanstone's Reports, Chancery.
Taunt. ..	..	Taunton's Reports, Common Pleas.
Vaugh. ..	..	Vaughan's Reports, Common Pleas.
Vern. ..	..	Vernon's Reports, Chancery.
Ves. ..	..	Vesey's (Junior) Reports, Chancery.
Ves. Sen. ..	..	Vesey's (Senior) Reports, Chancery.
Ves. & B. ..	..	Vesey and Beame's Reports.
W. Jo. ..	..	Sir William Jones' Reports.
W. R (Eng.) ..	..	Weekly Reporter (England).
W. & T. L. C. ..	..	White and Tudor's Leading Cases.
Willes ..	..	Willes' Reports, King's Bench & Common Pleas.
Y. & C. ..	..	Young and Collyer's Report.
Y. & C. Ex.	Young and Collyer's Exchequer Reports.
Y. & J.	Young and Jervis' Reports, Exchequer.

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"	145	598, 600	"	102	506, 511, 540
"	164	355, 533	"	146	413
"	254	352	"	185	361, 362, 499, 527
36 All.	36	360, 363, 503, 510	"	198	510
"	60	235	"	486	418
"	139	369, 509	"	633	14
"	176	570	"	659	536
"	195	359	"	665	224, 227
"	201	327, 530	"	674	186
"	272	495	"	708	376, 389
"	308	184, 186	"	748	68, 256
"	327	538	"	772	331
"	387	223	45 All.	46	376
"	551	360, 362, 363	"	72	340
37 All.	81	388, 389	"	115	631
"	101	494	"	179	42
"	474	354	"	273	506, 511
"	631	279	"	277	45
"	634	378	"	388	349, 419
38 All.	62	66, 295	"	478	107
"	103	376	"	492	107
"	107	37, 42	"	520	189
"	148	360, 363, 368	"	524	375, 376
"	154	66, 295	"	592	506
"	212	632, 636	46 All.	152	370, 387
"	254	311A, 534	"	173	337
"	461	351	"	269	467
"	502	517, 519	"	286	18, 20
"	570	337	"	303	568
"	627	14, 632	"	310	198
39 All.	166	178	"	333	107, 177, 178, 179, 294
"	196	47	"	359	625
"	244	327	"	377	189
"	536	514	"	514	107, 178
"	618	376	"	575	43A
"	719	375, 513	"	633	475
40 All.	187	270, 273, 621	"	637	184
"	384	45	"	897	472
"	487	45	47 All.	63	574
"	692	43, 120	"	90	534
41 All.	372	518	"	348	600
"	417	177	"	430	224
"	534	245	"	582	361, 362
"	611	42	"	619	63, 133, 641, 642
"	631	364, 413	"	625	235
42 All.	70	404	"	751	458, 512
"	319	242	"	883	87
"	336	320	"	923	235
"	420	367, 368, 509	48 All.	12	178
"	517	373	"	70	388, 389
"	596	198, 392	"	150	196
43 All.	95	360, 368, 381, 497A	"	171	376
"	263	187, 188, 189	"	221	235
"	314	311, 311A	"	292	378

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"	611	502, 506, 540	"	774	308
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"	787	339, 371	"	905	278
49 All.	25	5, 18A, 353	55 All.	83	74
"	233	537	"	235	238
"	405	337, 339	"	359	376, 378
"	516	235	"	503	198
"	527	107	"	554	186
"	558	465			
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"	328	26	"	220	529
"	371	307	"	474	204
"	375	141	"	517	370, 469
"	394	47, 51	"	534	184
"	454	274	"	621	87
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"	655	502, 540	"	768	378
"	818	627, 646	4 A.L.J.	273	37, 42
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51 All.	79	37, 270, 271, 619	"	492	392
"	454	4, 221	"	708	641
"	595	13, 255	"	712	51
"	606	320, 488, 494	"	756	625
"	612	18, 53, 56	5 A.L.J.	578	513
"	651	308	"	723	329
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"	780	410	"	227	47
"	802	391	"	737	353
"	920	519	7 A.L.J.	71	349
"	1016	502	"	391	419
"	1053	307	"	787	475
52 All.	139	184, 237, 247, 518A	8 A.L.J.	358	184, 188, 190
"	248	186, 188	"	418	407
"	281	377, 379, 381	9 A.L.J.	300	634
"	338	35, 61, 67	"	574	554, 559
"	358	493	"	794	600
"	434	351, 352	"	798	94
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"	604	308	"	124	389
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"	761	326	"	516	18
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"	901	311B, 528	"	407	285
"	985	72, 529, 534	"	729	348D
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"	"	910	..	368, 376	"	"	429	..	177, 178
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"	"	690	..	376	"	"	666	..	554, 573, 600
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"	"	582	..	503	"	"	493	..	384, 387
"	"	807	..	327	"	"	605	..	513
"	"	848	..	90	"	"	653	..	353
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"	"	731	..	256	"	"	339	..	471
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"	"	1086	..	331, 362	3	Bom.	21	..	564
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"	"	328	..	552, 602	"	"	172	..	311
"	"	524	..	258	"	"	329	..	346
"	"	539	..	281	"	"	402	..	65
"	"	887	..	10, 223, 224, 387, 389	4	Bom.	34	..	237
"	"	944	..	139, 635	"	"	89	..	290
1929	A.L.J.	217	..	472	"	"	126	..	212
"	"	433	..	308	"	"	432	..	59
"	"	460	..	14, 255	"	"	459	..	348A
"	"	515	..	90	"	"	584	..	442
"	"	537	..	235	5	Bom.	22	..	359
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"	"	620	..	74	"	"	154	..	257
"	"	846	..	493	"	"	206	..	518
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"	528	179	"	167	51
"	567	233	"	269	346, 411A
"	650	632	"	384	612
"	674	344	"	438	146
"	703	242	"	452	76
7 Bom.	101	646	"	506	26, 184
"	109	585	15 Bom.	27	376
"	256	92, 100, 597	"	247	17
"	262	92, 93, 597	"	257	413
"	452	637	"	407	599
"	474	559	"	443	146
"	526	520	"	549	642
"	538	95	"	647	546
8 Bom.	168	512	"	652	112
"	182	213	"	657	309
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"	435	393	"	631	599
"	491	120	"	711	428
"	524	362	"	736	225
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"	152	136	18 Bom.	7	112
"	435	611	"	13	294
"	634	346	"	66	223, 225
"	669	599	"	109	564
11 Bom.	78	471	"	110	599
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"	462	325, 329, 344	"	160	488, 490
"	475	420	"	372	264
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"	517	632	"	591	378
"	620	477	"	603	597
"	666	254, 262, 263	"	616	76
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"	33	483	"	207	18
"	217	238	"	528	394
"	221	17	"	626	62
"	231	379	20 Bom.	1	223
"	352	599	"	316	116, 146, 154
"	569	291	"	346	379
13 Bom.	45	376	"	354	599
"	90	342, 347, 523	"	408	336
"	126	64	"	439	603, 604
"	150	63	"	492	372, 467
"	156	632	"	511	101, 106
"	186	376	"	522	298, 299
"	229	28	"	553	349
"	257	376	"	615	375, 494
"	264	632	"	677	361, 362, 363
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"	311	580	"	538	26, 488
"	319	42	"	577	257, 265
"	396	371	"	643	506
"	619	376	27 Bom.	23	502, 506, 511, 540
"	709	337	"	31	629
"	827	319	"	91	353
22 Bom.	1	168, 223	"	146	257, 265
"	42	64	"	154	361, 379
"	176	281	"	262	615
"	213	26, 27, 28	"	266	233
"	241	557	"	292	364, 502
"	255	271	"	297	362
"	304	372, 488, 494	"	322	261, 262, 265
"	348	587	"	330	82
"	375	362, 363	"	408	28
"	409	120	"	452	26, 27, 28, 291
"	440	367, 467, 509	"	515	566
"	489	627	"	600	523
"	533	112	28 Bom.	181	446
"	610	73, 78	"	215	628
"	624	372	"	349	379, 380
"	658	64	"	466	288, 319
"	754	559	"	639	258
"	761	498	29 Bom.	19	325
"	939	238	"	42	211, 213
"	984	42	"	46	211, 330
23 Bom.	1	17, 255, 256, 261	"	150	112
"	15	576	"	199	27
"	22	17	"	213	614
"	56	319	"	323	20, 579
"	131	51, 643	"	391	580
"	146	257, 264	"	428	272
"	181	294	"	480	59
"	234	631	"	580	545
"	342	168, 174	30 Bom.	156	414
"	348	425A	"	167	366
"	385	198, 392	"	250	397, 435
"	406	264	"	304	42, 125
"	510	574	31 Bom.	15	611
"	525	281, 311	"	165	39, 42, 44, 69
"	659	117	"	185	18, 546
"	682	632	"	393	237, 242
"	725	118, 628	"	405	264
24 Bom.	31	18	"	527	506
"	400	294	"	552	330
"	502	21	"	566	32, 432
"	619	365	32 Bom.	185	64
25 Bom.	101	11	"	386	378, 529, 530
"	104	373	"	441	629, 634
"	202	256, 261, 263, 267	"	521	364, 509
"	244	549	33 Bom.	1	25
"	269	574	"	44	353
"	696	278, 618	"	53	24, 311A
26 Bom.	1	229	"	96	216, 217
"	88	495, 536	"	373	17
"	241	404, 425	"	610	657
"	252	344, 348B	34 Bom.	132	409
"	312	499	"	139	276
"	326	168	"	175	196
"	363	467, 471	"	287	17, 631
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"	269	189	"	529	51
"	327	425	"	597	37
"	333	576	"	621	270
"	342	24, 188, 189	"	719	21, 56
"	395	320	48 Bom.	38	616
"	403	39	"	341	615, 616
36 Bom.	500	566	"	435	251, 641A
"	510	202	49 Bom.	245	307
37 Bom.	53	287	"	325	299
"	198	649, 650	"	388	251, 641A
"	427	247	"	591	525
"	471	650	50 Bom.	331	376
"	621	238, 531	"	450	592, 611A
38 Bom.	24	536	"	566	107
"	255	662	"	692	469
"	369	538	51 Bom.	37	249
"	372	346, 356	"	274	544, 577
"	518	650	"	1040	221, 224
"	716	579	52 Bom.	1	45
39 Bom.	119	337	"	111	373
"	507	268	"	208	249
40 Bom.	69	74	"	219	18A, 350A
"	74	337	"	307	223, 389
"	248	373	"	313	629, 634, 637
"	313	285	"		641A, 643
"	483	467	"	883	24, 298
"	498	178, 179, 270, 294	53 Bom.	321	281
"	630	662	"	353	375, 513, 518
"	646	518	"	360	362
41 Bom.	170	9	56 Bom.	374	99
"	300	301	"	403	56
"	384	350, 351	"	462	649, 650
"	438	270, 273	"	556	281
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"	734	578, 612			
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"	181	312	3 Bom.L.R.	152	370
"	631	531	"	564	75
"	707	261, 262	"	658	69
44 Bom.	223	493	"	679	589
"	231	636	"	923	31
"	304	95	4 Bom.L.R.	146	69
"	405	352	"	453	367
"	488	42	"	893	116
"	542	63	5 Bom.L.R.	142	261
"	586	179, 270, 273	"	247	430
"	942	371	"	255	257
45 Bom.	117	363	"	387	367, 509
"	164	635	"	643	223
"	170	178	"	729	73
"	300	610	"	991	190
"	523	331	"	1036	277
"	910	28	6 Bom.L.R.	288	421, 423
"	1112	516	"	557	430, 432
"	1301	389	"	590	472
46 Bom.	195	312	"	832	307
"	213	517	7 Bom.L.R.	191	493
"	218	370	"	267	253
"	302	274	"	313	467
"	409	362	"	772	363, 545

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"	580	..	564	31 Bom.L.R.	345	..	233
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"	1173	..	249	"	476	..	251
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"	590	..	651	34 Bom.L.R.	117	..	238
"	874	..	18	"	164	..	223
"	944	..	352	"	748	..	356
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"	532	..	662	"	1384	..	346
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"	1396	..	294	"	90	..	660
"	1431	..	371, 376	"	117	..	376
23 Bom.L.R.	1241	..	429, 431	"	133	..	244
24 Bom.L.R.	351	..	42	"	252	..	384
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"	861	..	39	3 Bur.L.J.	63	..	284
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"	599	..	627, 637, 638	"	282	..	396A
"	839	..	369, 374, 439,	4 Bur.L.J.	52	..	80, 346
"		..	445, 503	"	154	..	298
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"	1027	..	270	"	106	..	349
"	1144	..	319	"	179	..	650
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"	553	..	463	"	115	..	533
"	626	..	568	"	143	..	188
"	678	..	611	"	167	..	384
"	1449	..	4, 376	"	169	..	346
28 Bom.L.R.	421	..	635	"	186	..	188
"	939	..	17, 78, 530	"	197	..	560, 566
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[illegible]

THE TRANSFER OF PROPERTY ACT ACT No. IV OF 1882.

[AS AMENDED BY ACT XX OF 1929 AND ACT V OF 1930.]

*An Act to amend the Law relating to the Transfer of Property
by act of parties.*

WHEREAS it is expedient to define and amend certain parts of
the law relating to the transfer of property
by act of parties; it is hereby enacted as
follows:—

Preamble.

1. History of the Act:—The kernel of the Bill which became the Transfer of Property Act was a draft prepared in England by the Indian Law Commission, which was sent out to India in 1870 by the Duke of Argyll, then Secretary of State, with instructions to take the necessary steps for passing it into law. It contained rules as to 'assurances'; immoveable property; charges; leases; settlements; apportionment; certain rights and liabilities of limited owners; the discretion of the Court to deal with settled land; powers; joint ownership; fourteen sections about trusts; and the assignment of choses in action. It was heterogenous ill-defined and ill-drawn, and parts of it were neither expedient nor necessary. The sections on powers, for instance, were unnecessary, and those relating to charges were inexpedient, as they would have given a mortgagee nothing but a right to have the amount of his debt raised by sale of the property pledged to him. No mortgagee was to take possession of the mortgaged land, no mortgagee was to foreclose. Not only the English but all the Indian forms of mortgages were ignored. It was felt by the then Law-Member of the Governor-General's Council that the amount of simplicity gained would not justify the amount of disturbance created.

However, in obedience to the orders of the Secretary of State, the Bill with some slight amendments made by the Law-Member was introduced into the Council in 1877, referred to a Select Committee and circulated to the Local Governments for publication and translation. A mass of criticisms and suggestions came in and the Bill was revised and republished in 1878 and for a second time sent to the Local Governments. Another mass of criticisms came in, and it became clear that the Bill, if it were to go on at all, must be relieved of the mass of unnecessary matter and made more homogeneous and confined to the subject of the transfer of property by act of parties, that is to say, by contract or gift. The Bill was therefore recast, circulated for a third time to the Local Governments and referred to a Commission. The Commission made several amendments, both in the wording and substance of the Bill but important addi

tions were only three: First, they set out in full on the face of the Bill several rules applying to transactions *inter vivos* which in the original draft were only expressed by way of reference *mutatis mutandis* to certain sections of the Succession Act dealing with (*e.g.*) election, contingent bequests, conditional bequests and bequests with direction as to application and enjoyment, and which therefore would never have been applied by unprofessional Judges without risk of serious error; secondly, they required, at the suggestion of Sir Henry Maine, who was a strong advocate of the continental system of a public transfer of land, a written and registered instrument in certain cases of sales, mortgages, leases, exchanges and gifts of immoveable property; thirdly, at the suggestion of one of the Hindu critics of the Bill, they inserted a chapter on gifts.

The recommendations of this Commission were duly communicated to the Select Committee. Most of the changes proposed were adopted and the Bill became law in 1882.

(See Whitley Stokes' *Anglo-Indian Codes*, Vol. I, pp. 738-739).

T. P. Amendment Act, 1929:—The Transfer of Property Act has been recently amended by the 'Transfer of Property (Amendment) Act, XX of 1929. The history of this Amendment is as follows: In 1921, an exhaustive examination of the case-law bearing on the Transfer of Property Act, 1882, was made by Mr. Justice Lal Gopal Mukherji. The results of the examination were thereafter in 1926 considered in the Legislative Department, and a Bill was prepared for the purpose of amending the Act in such a way as to clarify the numerous points upon which conflicting judicial decisions had been given; and in 1927 a Committee, consisting of the late Mr. S. R. Das (then Law Member), Sir B. L. Mitter (present Law Member), Mr. (now Sir) D. F. Mulla and Mr. Justice S. N. Sen, was appointed to consider generally the question of the amendment, and in particular to examine the draft Bill. This Committee (hereafter referred to as the *Special Committee*), whilst endorsing the departmental decision that the scope of the Bill should be limited to matters in regard to which there had been a conflict of judicial decisions or in regard to which such decision had shown the Act to be defective, made certain additions and alterations in the Bill. The Bill (L. A. Bill No. 33 of 1927) as finally settled by them was introduced in the Legislative Assembly in September 1927, and was circulated for opinion. The opinions were carefully considered by Sir D. F. Mulla (then Law Member); but the Bill which had been introduced in 1927 having lapsed, a fresh Bill (L. A. Bill No. 6 of 1929) substantially on the same lines, was introduced in the Legislative Assembly in March, 1929, and was referred to a *Select Committee*, who after having made some minor alterations in the Bill, submitted their Report in September 1929. This Bill has now passed into law and has been enacted as T. P. Amendment Act, XX of 1929.

The amendments made by this Act have come into force from the 1st April 1930.

[For Bill No. 33 of 1927, and the *Report of the Special Committee*, see Gazette of India, August 20, 1927, Part V, pp. 89—131; reprinted (as Bill No. 6 of 1929) in the Gazette of India, March 9, 1929, Part V, pp. 30—70; for the *Report of the Select Committee*, see Gazette of India, September 7, 1929, Part V, pp. 111—125; for Act XX of 1929, see Gazette of India, October 12, 1929, Part IV, pp. 33—44.]

N.B.—The Report of the Special Committee has been given in the Appendix; and the Notes on Clauses appended to the Report have been incorporated into the commentary in their proper places.

1A. Amendments have no retrospective effect:—Section 63 of the Transfer of Property Amendment Act (XX of 1929) expressly lays down that the amendments made thereby in the following sections of the Transfer of Property Act, 1882, namely, sections 2, 3, 15, 16, 17, 18, 53, 56, 58, 63A, 65A, 67(a), 67A, 68, 69, 69A, 91, 102, 107, 111, 114A, 119, 129, and 130 “shall not be deemed to affect—

- (a) the terms or incidents of any transfer of property made or effected before the first day of April, 1930,
- (b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,
- (c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or
- (d) any remedy or proceeding in respect of such right, title, obligation or liability;

and nothing in any other provision of this (Amendment) Act shall render invalid or in any way affect anything already done before the first day of April, 1930, in any proceeding pending in a Court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this (Amendment) Act had not been passed.”

2. Object of the T. P. Act:—“The chief objects of the Transfer of Property Act are two: first to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution upon death and thus to furnish the complement of the work commenced in framing the law of intestate and testamentary succession; and secondly, to complete the code of contract law, so far as relates to immoveable property. In aiming at these objects, the legislature has striven to avoid refinements and technicalities, to discard all rules whereby the parties to a transaction were made liable to unexpected consequences, all rules which seemed unfair or inexpedient in themselves, all provisions in deeds which were found in practice to lead to embarrassments and litigation. Like the Contract Act, it is not, and does not purport to be, an exhaustive measure”—Whitley Stokes’ *Anglo-Indian Codes*, Vol. I, p. 726.

3. Scope of Act:—The scope of this Act is limited to transfer of property by *act of parties* as contradistinguished from a transfer by operation of law, *e.g.*, in case of insolvency, forfeiture or sale in execution of a decree. It relates to transfer of property *inter vivos* and has no application to disposal of property *by will*—*Raja Parthasarathi v. Rajah Venkatadari*, 46 Mad. 190 (222), A.I.R. 1922 Mad. 457, 43 M.L.J. 486. Nor does it deal with cases of succession—*Kishori v. Krishna Kamini*, 37 Cal. 377 (382), 11 C.L.J. 401.

4. The Act not a complete Code:—The Transfer of Property Act is not exhaustive; it does not profess to be a complete code—*Satyabadi v. Harabati*, 34 Cal. 223 (228); *Bunsee Das v. Gena Lal*, 12 I.C. 155, 14 C.L.J. 530; *Mahomed Shafikul Huq v. Krishna Govinda*, 23 C.W.N. 284, 47 I.C. 428 (*per* Richardson J.); *Kishori Lal v. Krishna Kamini*, 37 Cal. 377 (382); *Bhupendra v. Wajihunnissa*, 2 P.L.J. 293 (300); *Jatindra v.*

Rangpur Tobacco Co., A.I.R. 1924 Cal. 990 (991), 80 I.C. 20; *Chotesha v. Maktum*, A.I.R. 1928 Nag. 223. Thus, for instance, it is not exhaustive on the law of mortgages—*Bhupendra v. Wajihunnissa*, 2 P.L.J. 293 (300), 39 I.C. 564; *Hotchand v. Kishinchand*, 17 S.L.R. 178, 83 I.C. 548, A.I.R. 1924 Sind 23 (24). Sec. 60 does not contain all the instances of severance of mortgages that may be conceived or allowed—*Low & Co. v. Pulin Bihari*, 59 Cal. 1372, 143 I.C. 193, A.I.R. 1933 Cal. 154 (161). It does not apply to a transfer of property by an award—*Amir Bibi v. Arokiam*, 34 M.L.J. 184 (187), 45 I.C. 813. It does not also apply to creation of easements—*Sital Chandra v. Delanney*, 20 C.W.N. 1158, 34 I.C. 450. It simply defines and amends ‘certain’ parts of the law of transfer of property and it should be noted that the word ‘consolidate’ has not been used in the preamble.

The Transfer of Property Act is not exhaustive; and where a case is not contemplated by any of the provisions of this Act, the High Court as a Court of Equity is entitled to administer the principles of equity as laid down in English or Indian cases which are not distinctly prohibited by statute—*Mayashankar v. Burjorji*, 27 Bom.L.R. 1449, A.I.R. 1926 Bom. 31, 91 I.C. 978; *Kalyan Das v. Jan Bibi*, 51 All. 454, 112 I.C. 765, A.I.R. 1929 All. 12 (14); *Maharaja of Jeypore v. Rukmini*, 42 Mad. 589 (598) (P.C.). But where the matter entirely falls within the terms of the Transfer of Property Act, the Courts are not at liberty to follow the English common Law rules—*Venkatacharyulu v. Venkatasubba*, 48 Mad. 821 (823), A.I.R. 1926 Mad. 55, 90 I.C. 725.

5. Construction:—For general observations regarding the interpretation of statutes, their retrospective operation, the importance to be attached to the marginal notes and the preamble, especially with reference to the Transfer of Property Act, read the recent cases of *Balaji v. Gangamma*, 51 M.L.J. 641, 99 I.C. 143, A.I.R. 1927 Mad. 85; *Girjanandan v. Hanumandas*, 49 All. 25 (F.B.), 24 A.L.J. 921, 99 I.C. 161, A.I.R. 1927 All. 1; and *Mohammadi Bibi v. Kashi*, A.I.R. 1926 All. 725, 96 I.C. 775.

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called the “Transfer of Property Act, 1882”:

Commencement.

It shall come into force on the first day of July 1882:

Extent.

It extends, in the first instance, to the whole of British India except the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of the Punjab, and the Chief Commissioner of British Burma.

But any of the said Local Governments may, from time to time by notification in the local official Gazette, extend this Act

or any part thereof to the whole or any specified part of the territories under its administration.

And any Local Government may, from time to time, by notification in the local official Gazette, exempt, either retrospectively or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely:—

Sections 54, paragraphs 2 and 3, 59, 107, and 123.

Notwithstanding anything in the foregoing part of this section, sections 54, paragraphs 2 and 3, 59, 107, and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1908, under the power conferred by the first section of that Act or otherwise.

In the last para, the figure "1908" has been substituted for "1877" by section 2 of the T. P. Amendment Act, 1929.

8. Extent—British India:—"The term 'British India' shall mean all territories and places within Her (His) Majesty's dominions which are for the time being governed by Her (His) Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India"—Sec. 3 (7) of the General Clauses Act, X of 1897.

Act IV of 1882 has ceased to be in force in the Naga Hills District (including the Mokokchang Sub-division), the Dibrugarh Frontier Tract, and North Cachar Hills, the Garo Hills, the Khasia and Jaintia Hills, and the Mikir Hills Tract.—See *Assam Rules Manual*, Ed. 1893, pp. 408, 409; Ed. 1884, Pt. II, pp. 212 and 795 respectively.

Bombay:—This Act has been extended from 1st January 1893 to the whole of the territories (other than the scheduled districts) under the administration of the Government of Bombay. See *Bombay Gazette*, 1892, Part I, p. 1071.

Punjab:—Although the Transfer of Property Act is not in force in the Punjab, the Punjab Courts, when deciding cases in which the principles of law dealt with by the provisions of this Act are involved, may adopt those provisions as embodying the law applicable to the case, especially where the law enunciated therein coincides with the principles of equity, good conscience and justice, and for which there is no statutory law applicable in the Punjab—*Bhagwan Devi v. Bunyadi Khanum*, 85 P.R. 1902; *Safdar Ali v. Ghulam*, 103 P.R. 1915, 30 I.C. 526; *Basso v. Mir Muhammad*, 278 P.L.R. 1913, 20 I.C. 291; *Hakim Singh v. Charandas*, 19 P.L.R. 1904; *Jangi Mal v. Pioneer Flour Mills*, 27 I.C. 115, 106 P.R. 1914; *Jhuman v. Dulia*, 4 Lah. 439 (441); *Moolchand v. Gangajal*, 11 Lah. 258 (F.B.), 31 P.L.R. 342, A.I.R. 1930 Lah. 356; *Mohammad Abdullah v. Mohammad Yasin*, 34 P.L.R. 245, A.I.R. 1933 Lah. 151 (152).

In a province to which this Act has not been extended the rule embodied in this Act should be allowed in preference to the English procedure—*Kadir Moidin v. Nepean*, 26 Cal. 1 (6, 7) (P.C.).

But although the equitable principles underlying the T. P. Act are followed in the Punjab, the Act itself with its technicalities does not apply to that province, and the Court commits an irregularity in relying upon that Act to dismiss on a purely technical point (*e.g.*, on the ground of absence of a written instrument of assignment of an actionable claim) a claim which is otherwise just and equitable—*Teja Singh v. Firm Kalyan Das*, 6 Lah. 487, A.I.R. 1925 Lah. 575, 26 P.L.R. 679, 91 I.C. 778. Although the equitable principles contained in the T. P. Act are sometimes followed by Punjab Courts, still the technical rules contained in the Act cannot be relied on by any litigant in the Punjab, and therefore deeds in that province need not be executed or attested according to the formalities required by this Act—*Kanwar Ram v. Ghugi*, A.I.R. 1928 Lah. 148, 108 I.C. 57.

Delhi:—This Act does not apply to Delhi. It cannot be said to have automatically come into force in Delhi in 1912, when Delhi was created a separate province, in the absence of any notification to that effect—*Ralli Brothers v. Punjab National Bank*, 11 Lah. 564, A.I.R. 1930 Lah. 920, 129 I.C. 21.

Berar:—This Act has been extended to Berar from 1907. Therefore a suit for foreclosure instituted after 1907 is governed by the T. P. Act, although the mortgage was executed prior to 1907—*Sheoram v. Jannabai*, 19 N.L.R. 18, A.I.R. 1923 Nag. 273, 65 I.C. 503.

Burma:—This Act has been extended from 1st January 1893 to the area included within the limits of Rangoon town and within the Municipalities of Moulmein, Bassein and Akyab. See *Burma Gazette*, 1904, Part I, pp. 628 and 684. From 1st January 1922, this Act has been extended to the whole of Burma, excepting certain areas.

“*Or any part thereof*”:—As to the meaning of these words occurring in the 4th para. of this section, see 5 Rang. 7 (P.C.) cited in Note 648 under section 129.

2. In the territories to which this Act extends for the time being, the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

Repeal of Acts. (a) the provisions of any enactment not hereby expressly repealed;

Saving of certain enactments, incidents, rights, liabilities, etc. (b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force;

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any right or liability; or

(d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law, or by, or in execution of, a decree or order of a Court of competent jurisdiction;

And nothing in the second chapter of this Act shall be deemed to affect any rule of * *, Muhammadan * * law,

Amendment:—In the last para, the words “Hindu” and “or Buddhist” have been omitted by section 3 of the T. P. Amendment Act (XX of 1929). For reasons, see Note 14 below.

N.B.—This amendment shall not affect any transfer made before 1st April, 1930. See Note 1A at page 3 *ante*.

9. Clause (a):—*Saving of certain enactments:* The effect of this clause is to maintain intact the statutory force which the Indian legislature had given to local usage in the Punjab (Act IV of 1872, Sec. 7) and Oudh (Act XVIII of 1876, Secs. 4, 8). Local usages are also saved by Secs. 36, 98 and 108. (Whitley Stokes' *Anglo-Indian Codes*, Vol. I, p. 746 footnote).

By virtue of this clause, a relinquishment made as provided by sec. 74 of the Bombay Land Revenue Code will stand unaffected by the provisions of this Act and can be effected without any registered instrument under sec. 123 of this Act—*Motibhai v. Dcsaibhai*, 41 Bom. 170 (177, 180), 18 Bom.L.R. 976, 38 I.C. 838.

“It is a fundamental rule in the construction of statutes that a subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication”—*per* Bovill J. in *Queen v. Champneys*, L.R. 6 C.P. 394 (cited in 20 Mad. 481).

10. Clause (c):—*Saving of rights or liabilities arising before the Act:*—This clause embodies the general principle that Acts are prospective and not retrospective in their operation. See also sec. 6 of the General Clauses Act.

This clause does not apply where the legal relation was constituted *after* the Transfer of Property Act came into force. Such a case will be governed by the provisions of this Act—*Ulfat Hossain v. Gayani*, 36 Cal. 802 (806).

Although the Transfer of Property Act may not, of its own force, apply directly to a case of *kanom* granted prior to this Act, the rules in this Act, being founded on reason and equity, may properly be applied to the case—*Vasudevan v. Valia Chathu*, 24 Mad. 47 (56) (F.B.). The principle of sec. 111 (*g*), being a rule of law in accordance with justice, equity and good conscience, has been applied to a lease executed before this Act, although the section itself is not applicable to the case—*Maharaja of Jeypore v. Rukmini*, 42 Mad. 589 (598) (P.C.). The rules of the T. P. Act may be applied to a mortgage executed prior to the passing of this Act, in the absence of any rule preventing them and in conflict with this Act—*Gopi Lal v. Abdul*, 26 A.L.J. 887, A.I.R. 1928 All. 381 (383), 116 I.C. 91.

There is nothing in this clause to disentitle the parties from seeking the relief given by *this* Act. It is a provision intended to preserve existing rights, and not a disabling provision. This section appears to have been intended to preserve the earlier remedies if the parties choose to avail themselves of them, and not to take away the remedy given under this Act. The right to a relief arising from a certain relation existing between the parties is a matter of adjective law, and consequently the parties are entitled, when a new remedy has been provided by a new Act at the time when the relation subsists, to take advantage of that remedy in a Court of law—*Bikkina Ramayya v. Adabala Seshayya*, 30 M.L.J. 338, 34 I.C. 475 (477).

The provisions of this Act apply to the assignment of a mortgage made after this Act came into force, although the mortgage may have been made before the commencement of the Act—*Lala Jugdeo v. Brij Behari*, 12 Cal. 505 (508); *Rathnasami v. Subramanya*, 11 Mad. 56 (60).

In order to claim the benefit of this clause (*i.e.*, in order to evade the provisions of the Transfer of Property Act), it is necessary to show that the right as it exists at present arose out of a legal relation constituted before this Act came into force. And so, where a tenancy was created before the commencement of this Act, but that tenancy *came to an end* and a new tenancy was thereafter constituted *subsequent to the passing of this Act*, the tenant cannot avail himself of the benefit of this clause and evade the operation of this Act—*Durgi Nikarini v. Gobordhan*, 19 C.W.N. 525 (527, 528), 20 C.L.J. 448, 24 I.C. 183.

Instances of rights saved by this clause:—

The provisions of Regulation XXXIV of 1803 relating to the maximum rate of interest allowed to the mortgagee are incidents of the mortgagor's rights, and if the mortgage was created before the passing of the Transfer of Property Act, such rights cannot be disturbed by this Act, and the mortgagee cannot claim interest exceeding the rate allowed by the Regulation—*Samar Ali v. Karimullah*, 8 All. 402 (405).

This Act has no retrospective effect so as to invalidate an order for sale the right to which arose out of a legal relation between the parties prior to this Act coming into force—*Naranappa v. Samarcharlu*, 19 Mad. 382 (384).

The provisions of sec. 59 of this Act relating to attestation do not apply to a mortgage created before the passing of this Act—*Jati Kar v. Mukunda*, 39 Cal. 227 (230).

Where valid and effectual proceedings taken under Regulation XVII of 1806 had arrived at a close, when the Regulation was still in force, and the mortgagee acquired an immediate right to have a decree declaring the property to be his absolutely, such right would be saved by this clause and therefore would be enforceable even after the T. P. Act came into operation—*Baij Nath Pershad v. Moheswari*, 14 Cal. 451 (456).

Where a mortgagee obtained a decree in 1880 (*i.e.*, before the passing of this Act) declaring his title to certain mortgaged properties of his mortgagor-judgment-debtor and authorising a sale thereof, he was entitled to execute the decree without the necessity of bringing a suit under sec. 67 (as provided by sec. 99)—*Dinendra v. Chandra Kishore*, 12 Cal. 436 (437).

The power to eject is a vested right whenever allowed by law or valid usage and cannot be said to be a mere matter of procedure or a portion of adjective law. Accordingly, in a suit by a landlord to eject the tenant filed before the coming into operation of the Transfer of Property Act, the provisions as to notice in this Act in the case of leases did not apply, and no notice to quit was necessary—*Ambabai v. Bhau*, 20 Bom. 759 (761, 762).

The provisions of this Act do not apply to Patni taluqs governed by Reg. VIII of 1819—*Surendra Narayan v. Bijoy Singh Dudhoria*, 52 Cal. 655, A.I.R. 1925 Cal. 962, 30 C.W.N. 233, 89 I.C. 785.

The provisions of the Transfer of Property Act do not apply to a tenancy created before the passing of the Act. A non-permanent tenure created before the Act was in force, is not transferable—*Hiramoti v.*

Annoda Prasad, 7 C.L.J. 553; *Kailash v. Hari Mohan*, 13 C.W.N. 541 (544), 1 I.C. 362, 10 C.L.J. 110; *Chota Nagpur Banking Association v. Kamakhya Narayan*, 7 Pat. 341, 109 I.C. 306, A.I.R. 1928 Pat. 431 (433). A tenancy of homestead land from year to year which was in existence before the passing of this Act (and which was not transferable except by custom) is not governed by this Act, and sec. 108 (j) does not make it transferable absolutely or by way of sub-lease—*Ananda Mohan v. Gobinda*, 20 C.W.N. 322, 33 I.C. 565 (567), *Sarada Kanta v. Nalini Chandra*, 54 Cal. 333, A.I.R. 1927 Cal. 39, 97 I.C. 817, 31 C.W.N. 231 (234); *Sulin Mohan v. Raj Krishna*, 25 C.W.N. 420 (423), 33 C.L.J. 193, A.I.R. 1921 Cal. 582, 60 I.C. 826. Sec. 108 (j) of this Act has no application to tenancies (e.g., of homestead land) created before the passing of the Act. The incident of non-transferability was common to tenancies from year to year created before this Act, and the right of transferability cannot be acquired by anything in this Act—*Umakanta v. Kashiram*, 23 I.C. 246 (247) (Cal.).

A lease executed before the passing of this Act would be excluded from the application of Chap. V—*Narayana v. Narayana*, 6 Mad. 327 (330); *Ambabai v. Bhau*, 20 Bom. 759. Thus, sec. 108 clause (o) does not apply to a lease created before the passing of this Act—*Meghlal v. Raj Kumar*, 34 Cal. 358 (370). The principles of Sec. 111 (g) of this Act are not applicable to a lease created prior to this Act, and therefore it is not necessary in case of such a lease that the lessor should, prior to an action of ejectment, do some act (e.g., giving notice) showing an intention to determine the lease—*Padmanabhaya v. Ranga*, 34 Mad. 161 (166), 20 M.L.J. 930, 6 I.C. 447. Where a grant of *mokarari* lease was made to a person prior to the Transfer of Property Act, and he subsequently obtained a *patni* lease but kept the two leases distinct and separate, held that as the *mokarari* was granted prior to the T. P. Act, sec. 111 (d) did not apply, and there was no merger of the two interests—*Hirendra v. Hari Mohan*, 18 C.W.N. 860 (864), 22 I.C. 966.

11. Procedure not saved by clause (c):—The procedure by which a right or liability may be determined or enforced or a relief may be obtained is not a 'right' or 'liability' or 'relief' within the meaning of this clause. Therefore a suit brought *after* the Transfer of Property Act came into force, for the foreclosure of a conditional mortgage executed prior to this Act, will be governed by the procedure prescribed by this Act and not by the procedure prescribed under Regulation XVII of 1806, the procedure under the earlier Regulation not being saved by this clause—*Ganga Sahai v. Kishen Sahai*, 6 All. 262 (267) (F.B.). No one has a vested right in any particular form of procedure—*Warner v. Murdoch*, L.R. 4 Ch. D. 750, at p. 752 (per James, J.); *Republic of Costa Rica v. Erlanger*, L.R. 3 Ch. D. 69 (per Mellish L.J.). Clause (c) of sec. 2 preserves the *rights* of the parties in respect of mortgages executed before the commencement of this Act, but after the introduction of this Act the *procedure* for enforcing those rights is governed by its provisions—*Murli-dhar v. Parsharam*, 25 Bom. 101 (103). "It does not follow that because a suitor has a cause of action, he has also a vested right to enforce it by a course of procedure and practice which was in force when he began his suit. He has only the right of prosecuting it in the manner prescribed for the time being by or for the Court in which he sues, and if an Act of Parliament alters that mode of procedure, he has no other right than to

proceed according to the altered mode"—Maxwell's *Interpretation of Statutes*.

Although a mortgage may be anterior to the passing of the Act, yet when a person comes into Court and claims a remedy under the mortgage, after the commencement of this Act, the procedure of this enactment will apply—*Umda v. Umrao Begum*, 11 All. 367; *Shiva Devi v. Jaru*, 15 Mad. 290; *Mata Din v. Kazim*, 13 All. 432 (F.B.); *Kaveri v. Ananthayya*, 10 Mad. 129; *Bhobo Sundari v. Rakhal Chunder*, 12 Cal. 583 (589) (F.B.); *Rameshwar v. Mahomed Mehdi Hossain*, 26 Cal. 39 (P.C.); *Bikkina v. Adabala*, 30 M.L.J. 338, 34 I.C. 475 (477).

If, however, all the steps that were necessary to be taken to foreclose the mortgage had been taken under the earlier Regulation (i.e., where valid and effectual proceedings had been taken under the Regulation to foreclose the mortgage by giving a notice for foreclosure) and all that remained was to bring a suit for foreclosure, *held* that the suit for foreclosure would be governed by the earlier Regulation, and not by the Transfer of Property Act, although it was filed after the passing of this Act; the reason being that the proceedings had practically commenced (by the service of notice) before the passing of this Act—*Umesh Chunder v. Chunchun*, 15 Cal. 357 (360, 361); *Mohabir Pershad v. Gangadhar*, 14 Cal. 599 (604); *Baij Nath v. Moheswari*, 14 Cal. 451 (456).

12. Pending proceedings:—It is not the intention of the Transfer of Property Act to render ineffectual any suit commenced and decree made under the procedure in force before this Act was passed. The plaintiff in this case instituted a suit for sale on his mortgage in 1881, and after its institution and while it was pending, the T. P. Act came into force. He obtained a decree for sale of the mortgaged property. In the execution proceedings the judgment-debtor objected that with reference to the terms of sec. 99 of the T. P. Act, the decree-holder was not entitled to bring the mortgaged property to sale otherwise than by instituting a suit under sec. 67 of the Act (and the suit instituted under the earlier Regulation would be of no effect). *Held* that the objection was not valid, as the decree-holder had acquired *rights* under the decree which are, under this section, not affected by the provisions of sec. 99 of this Act—*Makund Ram v. Ram Sarup*, 1884 A.W.N. 274. But if the proceedings in respect of a mortgage executed before 1882 are *commenced after* the passing of this Act, the entire procedure of this Act must be followed, and the decree-holder cannot, by reason of the operation of sec. 99, gain a right to bring the property to sale otherwise than by following the procedure under sec. 67—*Kaveri v. Ananthayya*, 10 Mad. 129; *Ram Prashad v. Ram Prasad*, 4 O.C. 231.

Rights already extinguished cannot be revived by this Act:—Where the right of the mortgagee to bring a suit for foreclosure and possession was wholly extinguished in 1878, by operation of the law of limitation, and the title of the purchasers from the mortgagor was freed from the mortgage, the subsequent creation of suits for foreclosure by the Transfer of Property Act in 1882 could not revive the extinct right. The clear enactment of clause (c) of sec. 2, T. P. Act is in effect the other way—*Srinath v. Khetter Mohun*, 16 Cal. 693 (701) (P.C.).

13. Clause (d):—The meaning of this clause is that a transfer by operation of law or in execution of a decree or order of a Court shall not be *affected*, i.e., validated or invalidated, by anything contained in this

Act. This clause appears to mean that the various provisions in the Act regulating and codifying the law as to the actual transfers by act of parties shall not affect transfers by operation of law. The latter are to remain unaffected by those provisions—*Promotho v. Kali Prasanna*, 28 Cal. 744 (747).

Thus, a transfer by sale in execution of a decree is exempted by this clause from the operation of the Transfer of Property Act; consequently a registered conveyance under Ch. III of this Act is not necessary to give validity to this transfer—*Balaji v. Dajiba*, 2 C.P.L.R. 137. Similarly a person purchasing a debt at an execution sale is not affected by sec. 135 of this Act. He can recover the same without regard to the terms of Chapter VIII of this Act—*Krishnan v. Parachan*, 15 Mad. 382. So also, a decree for specific performance of a contract of sale of immoveable property coupled with the payment of purchase money, passes the ownership to the vendee and entitles him to the ownership of the property; it is not necessary that any conveyance should be executed in favour of the decree-holder in order to pass the ownership—*Dhandiba Krishnaji v. Ramachandra*, 5 Bom. 554.

Sec. 36 has been held inapplicable to a case of transfer by operation of customary law—*Mathewson v. Shyam Sundar*, 33 Cal. 786. See this case cited in Note 158 under sec. 36. But the provisions of sec. 53, being founded on principles of justice, equity and good conscience, have been applied to a case of transfer by operation of law (e.g., a transfer effected by order of Court based upon an award)—*Akram-unnissa v. Mustafa-unnissa*, 51 All. 595, A.I.R. 1929 All. 238 (239), 116 I.C. 445.

A sale by an Official Receiver acting under the provisions of the Provincial Insolvency Act is not a transfer by operation of law or in execution of a decree or order of Court. The order of the Court under the Prov. Insolv. Act simply vests the property in the Official Receiver, and on such vesting he is entitled to sell the property, without any leave or order of the Court. Though the property vests in the Receiver by operation of law, the transfer by him is a transfer by one party to another and cannot be said to be a 'transfer by operation of law' in favour of the vendee—*Basava Sankaran v. Anjaneyalu*, 50 Mad. 135 (F.B.), 51 M.L.J. 529, A.I.R. 1927 Mad. 1, 99 I.C. 8. Where a security bond is executed under O. 32, r. 16, C. P. Code, in favour of the Court, hypothecating certain immoveable property to secure a proper disposal of the money due to certain minors, an assignment of the security-bond by the Court in favour of the minors on their attaining majority in order to enable them to realise the money from the surety does not require to be effected by a registered instrument. As the transfer takes place by an order of the Court, it is unaffected by the provisions of the T. P. Act requiring registration, by virtue of sec. 2 (d)—*Ram Saran v. Yudhishtar*, 53 All. 786 (F.B.), 29 A.L.J. 503, A.I.R. 1931 All. 389 (390), 133 I.C. 904.

14. "And nothing . . . Muhammadan Law":—The reference to Hindu and Buddhist law has been omitted from this clause, and the reason for this omission has been thus stated:—

"Section 2, which is a saving clause, does not provide that Chapter II shall not apply to Hindus, Muhammadans or Buddhists; it merely saves any rule of Hindu, Muhammadan or Buddhist law which is not consistent with its provisions. The Chapter contains general rules regarding transfers. It is obvious that sections 5 to 10 contain rules which are of

general application and do not in any way contravene any rule or principle peculiar to the personal laws of Hindus or Buddhists. So also, sections 38 to 53 are not peculiar to any particular system of law and are rules of justice, equity and good conscience. Sections 11 to 35 correspond to parallel provisions of the Indian Succession Act, and were introduced in the Transfer of Property Act in order to bring the rules which regulated the transfer of property between living persons into harmony with the rules affecting its devolution upon death. Sections 13 and 20 relate to transfers in favour of unborn persons, and section 14 enacts a modification of the rule against perpetuity. According to strict principles of Hindu law, as laid down by the Privy Council decision in *Tagore v. Tagore* (I.A. Sup. Vol. 47), transfers or bequests in favour of unborn persons are wholly void. That principle is, however, now modified by the Hindu Disposition of Property Act (XV of 1916) and by Madras Acts (I of 1914 and VIII of 1921). So far, therefore, as the rules of Hindu law are concerned, the saving clause in section 2 seems unnecessary and we propose that the word 'Hindu' be omitted from that section. We also understand that the Government of Burma as well as the Rangoon High Court have no objection to the omission of the word "Buddhist" from the last paragraph in section 2. We, therefore, propose to omit that word also.

"Since the rules contained in Chapter 2 are not in all cases in conformity with the personal law of Muhammadans, we have retained the word 'Muhammadan.'"—*Report of the Special Committee* (1927).

The *Mahomedan Law of gift* is not affected by anything enacted in the Transfer of Property Act—*Sadik Hussain v. Hashim Ali*, 38 All. 627 (646) (P.C.); *Babu Lal v. Ghanesham Das*, 44 All. 633 (634), 20 A.L.J. 466, A.I.R. 1922 All. 205, 70 I.C. 84.

Under the Mahomedan law, the transfer or renunciation of an expectant right of inheritance is invalid; and since the rules of Mahomedan law are not affected by the Transfer of Property Act, it is unnecessary to consider whether such transfer or renunciation would be valid or invalid under this Act—*Asa Beevi v. Karuppan*, 41 Mad. 365 (370). The provisions of sec. 53 are not inconsistent with Mahomedan law; consequently that section has been applied to a waqf created by a Mahomedan for the purpose of defeating his creditors—*Ahmad Husain v. Kallu Mian*, 27 A.L.J. 460, A.I.R. 1929 All. 277 (278), 117 I.C. 97; *Bismillah v. Tahsin Ali*, 1930 A.L.J. 616, A.I.R. 1930 All. 462 (465), 124 I.C. 722.

The right of a Hindu mortgagor to the protection afforded by the rule of *damdupat* is not affected by anything contained in the Transfer of Property Act—*Jeewanbai v. Manordas*, 35 Bom. 199 (203), 8 I.C. 649, 12 Bom.L.R. 992.

15. Crown Grants:—An exemption from the operation of this Act has been made by the Crown Grants Act (Act XV of 1895), sec. 2 of which lays down that nothing in the Transfer of Property Act shall apply to any grant or transfer of land or of any interest therein heretofore made or hereafter to be made by the Crown in favour of any person whomsoever and that every such grant and transfer shall be construed and take effect as if the Transfer of Property Act had not been passed.

16. Maintenance Grants:—A grant of immoveable property to a Hindu widow for maintenance need not be made by a written instrument. The Transfer of Property Act does not apply to such transactions—*Jirvan Lal v. Chudaman*, 10 N.L.R. 111, 26 I.C. 835.

3. In this Act, unless there is something repugnant in the Interpretation-clause. subject or context—

“immoveable property” does not include standing timber, growing crops, or grass:
 “Immoveable pro-
 perty:”
 “instrument:” means a non-testamentary instrument:

“attested”, in relation to an instrument, means and must be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary:

“registered” means registered in British India under the law for the time being in force regulating the registration of documents:
 “registered:”
 “attached to the earth:” means—

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls or buildings; or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached:

“actionable claim” means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent: and

a person is said to have “notice.” ‘notice’ of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search which he ought to have

a person is said to have “notice.” ‘notice’ of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search which he ought to

made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229

have made, or gross negligence, he would have known it. * * *

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:

Provided that—

- (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,
- (2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and
- (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

Amendments:—The definition of “attested” has been added by the T. P. Amendment Act, 1926. See Note 18A.

The definition of “notice” has been amended and the three Explanations added by sec. 3 of the Transfer of Property Amendment Act, 1929. Explanation I has been further amended by the Transfer of Property Amendment Act V of 1930. See Note 26 below. This amendment has no retrospective effect. See Note 1A at p. 3 *ante*.

17. Immoveable Property:—This expression has not been defined in this Act, but the following definitions given in other Acts may be considered:—

“Immoveable property” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.—Sec. 3 (25), *General Clauses Act* (X of 1897).

“Immoveable property” includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefits to arise out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, or grass.—Sec. 2 (6), *Registration Act* (XVI of 1908).

The following are immoveable property:—

(a) The ‘equity of redemption’ in mortgaged property is considered as immoveable property—*Casborne v. Scarfe*, 1 Atk. 603; *Parashram v. Govind*, 21 Bom. 226 (228); *Kanti Ram v. Kutubuddin*, 22 Cal. 33 (41); *Umesh v. Zahur*, 18 Cal. 164.

(b) A Hindu widow’s life-interest in the income of her husband’s immoveable property—*Natha v. Dhunbaiji*, 23 Bom. 1 (11).

(c) Office of hereditary priest of a temple—*Krishnabhat v. Kapabhat*, 6 B.H.C.R. A.C. 137.

(d) Right of way—*Bejoy Chandra v. Bunku Behari*, 13 C.W.N. 451, 4 I.C. 116.

(e) Right to collect rents from occupancy raiyats in actual possession—*Innasi v. Sivagram*, 5 M.L.J. 95.

(f) Right to collect dues from a fair on a piece of land—*Sikandar v. Bahadur*, 27 All. 462.

(g) A right of ferry—*Krishna v. Akilanda*, 13 Mad. 54.

(h) A right to officiate as priest at funeral ceremonies of Hindus—*Raghoo v. Kassy*, 10 Cal. 73.

(i) A right of *Malikana*, which is an annual recurring charge on immoveable property—*Churaman v. Balli*, 9 All. 591 (597).

(j) A *hat* (market)—*Surendra Narain v. Bhai Lal*, 22 Cal. 752; *Golam v. Parbati*, 36 Cal. 665.

(k) A *toda giras hak*, i.e., a right to receive an annual payment from a village—*Futtehsangji v. Dessai*, 22 W.R. 178 (P.C.).

(l) A *haq-i-chaharum*, i.e., the customary right of the Zemindar to receive a fourth share of the sale proceeds of certain property—*Dhandai Bibi v. Abdur Rahman*, 23 All. 209.

(m) Right to possession and management of *saranjam*—*Narayan v. Vasudev*, 15 Bom. 247.

(n) Right to levy rate or cess on all exports and imports—*Krishnaji v. Gajanan*, 33 Bom. 373, 2 I.C. 489.

(o) Right to the assessment payable on a sub-tenure—*Madharao v. Kashibai*, 34 Bom. 287, 5 I.C. 599.

(p) Hereditary offices are regarded by Hindu law as immoveable property—*Balwant v. Parsotam*, 9 B.H.C.R. 99; *Sinde v. Sinde*, 4 B.H.C.R. 51; *Collector of Thana v. Kashinath*, 5 Bom. 322; *Raghoo v. Kassy*, 10 Cal. 73.

(q) Right of fishery—*Parbutty v. Madho Pande*, 3 Cal. 276; *Ram Gopal v. Nurumuddin*, 20 Cal. 446; *Shibu Halder v. Gupisundari*, 24 Cal. 449; *Fadu v. Gour*, 19 Cal. 544; *Bhundal v. Pandol*, 12 Bom. 221.

(r) The interest of a mortgagee in immoveable property—*Paresnath v. Nabagopal*, 29 Cal. 1; *Benarsi v. Ram Chandar*, 34 P.L.R. 233, A.I.R. 1933 Lah. 210 (211).

(s) The right to collect lac from trees—*Parmanandy v. Birkhu*, 5 N.L.R. 21, 1 I.C. 903.

(t) Factory—*Amratlal v. Keshavlal*, 28 Bom.L.R. 939, A.I.R. 1926 Bom. 495 (496), 98 I.C. 696.

(u) *Varshasans* or annual allowances charged on immoveable property—*Keshav v. Vinayak*, 23 Bom. 22.

See also notes under sec. 105.

17A. Mortgage-debt is immoveable property:—Before the amendment of the definition of actionable claim in section 3 of this Act, a *debt secured by mortgage of immoveable property* was held to be an actionable claim; but after the amendment (made by Act II of 1900), the definition of an actionable claim expressly excludes a debt secured by a mortgage of immoveable property; and such a debt will now be treated as immoveable property, and can be transferred only in the same way as an immoveable property is transferred (*viz.*, by a registered instrument)—*Perumal v. Perumal*, 44 Mad. 196 (200, 201); *Sakhiuddin v. Sonaula*, 22 C.W.N. 641 (644), 45 I.C. 986; *Elumalai v. Balakrishna*, 44 Mad. 965 (968), A.I.R. 1922 Mad. 344, 66 I.C. 168; *Imperial Bank of India v. Bengal National Bank*, 34 C.W.N. 605 (610).

Even though the debt is secured by an *equitable mortgage* (*i.e.*, where the debt is embodied in a promissory note accompanied by deposit of title deeds), the mortgage-debt is to be deemed an immoveable property and can be transferred only by a registered instrument—*Elumalai v. Balakrishna*, 44 Mad. 965 (968), dissenting from *Perumal v. Perumal*, 44 Mad. 196 (201), where Wallis, C.J., expressed an opinion that a debt secured by an equitable mortgage could be transferred by endorsement of the promissory note alone, and no registered instrument was necessary.

18. The following are not immoveable property:—

(a) A decree for sale of immoveable property on a mortgage—*Abdul Majid v. Muhammad Faizulla*, 13 All. 89 (91); *Ahmad Khan v. Abdul Rahman*, 26 All. 603 (605); *Baij Nath v. Binoyendra*, 6 C.W.N. 5 (6); *Gous Mahomed v. Khawas Ali Khan*, 23 Cal. 450 (453).

(b) Right of purchaser to have the lands registered in his name—*Bhikaji Baji v. Pandu*, 19 Bom. 43.

(c) G. P. Notes—*Durga v. Pooran*, 5 W.R. 141.

(d) A right of worship (whether a right of exclusive worship, or a *pala* or turn of worship)—*Eshun Chandra v. Monmohini*, 4 Cal. 683 (685); *Jatkar v. Mukunda*, 39 Cal. 227 (230); *Mohamaya v. Haridas*, 42 Cal. 455, 27 I.C. 400; *Narasingh v. Prolhadman*, 46 Cal. 455, 47 I.C. 25.

(e) Royalty—*Krishna Kishore v. Kusunda Collieries*, 65 I.C. 673 (Pat.).

(f) A machinery which is not permanently attached to the earth and which can be removed from one place to another—*Meghraj v. Krishna Chandra*, 46 All. 286 (292), A.I.R. 1924 All. 365, 78 I.C. 243.

(g) A right to recover maintenance allowance (even though it is charged on immoveable property) is not in itself immoveable property—*Altaf Begam v. Brij Narain*, 51 All. 612, 27 A.L.J. 367, A.I.R. 1929 All. 281 (285), 116 I.C. 855.

Standing timber:—"In excepting standing timber, growing crops and grass from the category of immoveable property, regard has probably been had to the fact that they are all things usually contemplated as severable or intended to be severed from the soil"—Shephard and Brown, 7th Edn., p. 14. A standing timber is a tree which is fit to be used in building and repairing houses, and which has not been severed from the ground—*Badan Kumari v. Suraj Kumari*, 3 A.L.J. 20; *Krishna Rao v. Babaji*, 24 Bom. 31. Trees which bear fruit or other forest produce are not standing timber but are considered as immoveable property—*Katwaru v. Ram Adhin*, 10 A.L.J. 516, 17 I.C. 910; *Sakharam v. Vishram*, 19 Bom. 207 (208); *Ali Sahib v. Mohideen*, 13 Bom.L.R. 874, 12 I.C. 375. Thus where mangoe trees were mortgaged with the condition that the mortgagee must not cut down the trees so as to convert them into timber but must use them for the purpose of enjoying the fruits, the trees must be regarded as immoveable property, and not moveable—*Shiv Dayal v. Puttu Lal*, 54 All. 437, 140 I.C. 491, A.I.R. 1933 All. 50 (52, 53); see also *Bodha v. Ashloke*, 5 Pat. 765, A.I.R. 1927 Pat. 1, 98 I.C. 779. But if according to the custom of a particular locality, a fruit-bearing tree is used in building or repairing houses, it can be taken to be a timber tree—*Badan v. Suraj*, 3 A.L.J. 20; *Krishna Rao v. Babaji*, 24 Bom. 31; *Nahanchand v. Modi*, 31 Bom. 185 (197).

An agreement assigning for consideration a *right to enjoy the produce* of, and to cut and remove the trees, grass, etc., growing on a land for a period of 4 years is an instrument conveying an interest in immoveable property—*Sceni Chetiar v. Sanatanathan*, 20 Mad. 58 (60) (F.B.). But a document which entitles certain persons merely to cut and remove all kinds of trees on a certain forest for two years, but *not to enjoy the produce* of the trees, is a mere sale of standing timber, and not one which conveys an interest in immoveable property—*Mathura Das v. Jadubir*, 28 All. 277 (278). The principle of these decisions is that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, and from further vegetation, the contract is to be considered as one creating an interest in land; but where the process of vegetation is over, and the parties agree that the thing shall be immediately withdrawn from the land, the land should be considered as a mere warehouse of the thing sold, and the contract is one for sale of moveable property. See also *Mammikutti v. Puzhakkal*, 29 Mad. 353 (357); *Natesa v. Thangavelu*, 38 Mad. 883 (885). *Marshall v. Dyren*.

Growing crops:—"Growing crops" are not included in the definition of immoveable property. This term must be held to include all vegetable growths, whether in the form of fruit, bark or roots—*Atmaram v. Doma*, 11 C.P.L.R. 87. A crop of sugar-cane is not immoveable property, and an endorsement of a bond hypothecating such crops does not require registration—*Kalka Prasad v. Chandan*, 10 All. 20.

18A. Attestation:—The definition of 'attested' has been newly added by the Transfer of Property Amendment Act XXVII of 1926. This definition has been taken almost word for word from section 63 of the Indian Succession Act (XXXIX of 1925). The effect of this new definition will be fully considered in Note 353 under sec. 59.

The words "*and must be deemed always to have meant*" have been added by the Repealing and Amending Act, X of 1927 (see Gazette of India, 1927, Part IV, p. 24). The meaning of this Amendment is that the definition of the word "attested" in sec. 3, as introduced by the Amendment Act of 1926 shall have *retrospective effect*; in other words, all documents *executed prior to the passing of the T. P. Amendment Act XXVII of 1926*, in which the attesting witnesses did not actually see the executant sign the deed but received from the executant a personal acknowledgment of his signature on the deed, and then attested the deed, must be deemed to have been validly attested—*Veerappa v. Subramania*, 52 Mad. 123 (F.B.), 55 M.L.J. 794, 116 I.C. 367, A.I.R. 1929 Mad. 1; *Radha Mohan v. Nripendra*, 47 C.L.J. 118, A.I.R. 1928 Cal. 154, 31 C.W.N. clx; *Motilal v. Kasambhai*, 29 Bom.L.R. 1334, 105 I.C. 864; *Abinash v. Dasarath*, 56 Cal. 598, 32 C.W.N. 1228; *Yacub Khan v. Gujar Khan*, 52 Bom. 219, A.I.R. 1928 Bom. 267; *Gangaram v. Umaji*, A.I.R. 1928 Nag. 70.

The effect of the addition of the above words by the Repealing and Amending Act X of 1927 is to overrule the decision in *Girija Nandan v. Hanumandas*, 49 All. 25 (F.B.), 24 A.L.J. 921, A.I.R. 1927 All. 1, 99 I.C. 161, in which it was held that the definition of the word 'attested' had *no* retrospective effect and did not apply to documents executed prior to 25th March, 1926 (on which the T. P. Amendment Act XXVII of 1926 came into force). The decision in *Balaji v. Gangamma*, 51 M.L.J. 641, A.I.R. 1927 Mad. 85, 99 I.C. 143, and *Mohamedi v. Kashi*, A.I.R. 1926 All. 725, 96 I.C. 775 will stand as correct. It has been held in a recent Allahabad case that the new definition of "attested" as added by the T. P. Amendment Act XXVII of 1926 has no retrospective effect, even by virtue of the Repealing and Amending Act X of 1927—*Balbhadar v. Lakshmi Bai*, 1930 A.L.J. 623, A.I.R. 1930 All. 669 (672), 125 I.C. 507. This proposition, it is submitted, is not correct. It is curious that no reference has been made to 52 Mad. 123 (F.B.) and other recent cases. But the actual decision in the case was right. The facts of the case are that a deed of gift purported to be attested by three witnesses, of which one only was produced at the date of suit. Another witness had died, and the third was not called in as he was hostile. The witness who came to Court deposed that the executant signed the document in his presence, and that the two other witnesses were not then present. *Held* that the document was not properly attested. [As the other witnesses could not be called in, it was impossible to prove whether the other witnesses signed the deed after receiving from the executant a personal acknowledgment of his signature.] But where the witness who was called in Court stated that he did not see the executants sign their names but that they admitted execution before him and the other witness, and thereupon he and the other witness signed as witnesses, *held* that the deed was duly attested—*Provakar v. Indra Narayan*, 53 C.L.J. 326, 134 I.C. 531. In this case it was held that the definition of "attested" had retrospective effect because of Act X of 1927.

The Amendment Act XXVII of 1926 is retrospective in its operation. Consequently, though at the time of the trial of the suit the law in force was the old Act, still if at the time of the hearing of the appeal, the Amendment Act (1926) came into force, the new Act applied to the case; consequently the attestation made by a witness who signed upon the mortgagor admitting his signature, was valid—*S. M. A. R. L. Firm v. R. M. M. A. Firm*, 5 Rang. 772, A.I.R. 1928 Rang. 101, 109 I.C. 469; *Radha Mohan v. Nripendra*, 47 C.L.J. 118, A.I.R. 1928 Cal. 154 (156).

But although the amendment was intended by the Legislature to have retrospective effect and to validate mortgages which were executed before the amending Act was passed, still the Legislature did not intend to validate mortgages which were pronounced by a competent Court to be invalid for want of proper attestation according to the law then in force—*Harbhagwandas v. Ghulam Shah*, 25 S.L.R. 59, A.I.R. 1931 Sind 64 (65), 131 I.C. 719.

Attestation by Registering Officer:—The acknowledgment of execution before the Registering Officer and the signature of that officer affixed to the registration endorsement amount to sufficient attestation within the meaning of the definition given in this section—*Radha Mohan v. Nripendra Nath*, 47 C.L.J. 118, A.I.R. 1928 Cal. 154 (156), 105 I.C. 422; *Veerappa v. Subramanya*, 52 Mad. 123 (F.B.), 55 M.L.J. 794, 116 I.C. 367, A.I.R. 1929 Mad. 1; *Ram Charan v. Bhairon*, 53 All. 1, A.I.R. 1931 All. 101 (102); *Budhar v. Rahimtulla*, A.I.R. 1928 Sind 93 (94), 107 I.C. 216. But it must be shown that the Sub-Registrar affixed his seal or signature to the document *in the presence* of the executant—*Abinash v. Dasarath*, 56 Cal. 598, 32 C.W.N. 1228 (1232), 114 I.C. 84, A.I.R. 1929 Cal. 123. The effect of these decisions is that a document is validly executed if it is attested by one witness only, the registering officer being treated as the second witness, and this was what actually happened in these cases. See also *Sarada Prosad v. Triguna*, 1 Pat. 300 (305). This proposition has however been doubted in 5 Rang. 772, A.I.R. 1928 Rang. 101.

Attestation by scribe:—See Note 352 under sec. 59.

No form of attestation is necessary:—This definition lays down that no particular form of attestation is necessary. A person may be a witness to the execution of a document and yet may not have written his name at the time by way of saying that he was a witness. Ordinarily a string of signatures towards the end of an instrument or somewhere on the instrument without any explanation will be quite sufficient to show that the persons put their signatures as witnesses—*Abinash v. Dasarath*, 56 Cal. 598, 32 C.W.N. 1228 (1231), A.I.R. 1929 Cal. 123, 114 I.C. 84.

19. Registered:—A document cannot be said to have been duly registered if the registration has been made in contravention of the provisions of the Registration Act, *e.g.*, if the description of the property given in the document is erroneous or insufficient or misleading for the purposes of identification or if the document has been registered by an officer of another district in which the property is not situate or if the document was presented by a person who had no authority to do so—*Beni Madhab v. Khatir Mondul*, 14 Cal. 449 (450); *Baij Nath v. Sheo Sahay*, 18 Cal. 556 (569) (F.B.); *Joginee Mohan v. Bhootnath*, 29 Cal. 654 (663).

20. Attached to the earth:—This expression occurs only in two places in the Act, *viz.*, in section 8, para. 2, and in section 108, clause (h).

These words are apparently used to denote what are termed 'fixtures' in the English law, but the principles applied in English Law for determining whether a thing is a 'fixture' or not ought not to be applied for the determination of the question whether it is 'attached to the earth' under the Indian law.

In England, the law as to fixtures is based on the maxim '*quicquid plantatur solo solo cedit*' (whatever is planted on the soil belongs to the soil); but this maxim has not any wide application in India. According to Indian law, anything to be a fixture must be "attached to the earth" as defined in section 3 of the Transfer of Property Act. Where a corrugated iron shed erected on the leased premises was not attached to the earth, but simply rested by its own weight on the foundation prepared for it, *held* that there was no such annexation as would make the shed a fixture with the lease—*Chaturbhuj v. Bennett*, 29 Bom. 323 (343). Where there was nothing to show that a machinery was attached to a building for the permanent beneficial enjoyment of the building, but rather the building existed for the purpose of sheltering the machinery and protecting it from the weather, *held* that the machinery was not attached to the building within the meaning of clause (c) of this definition, and was therefore not immoveable property—*Meghraj v. Krishna Chandra*, 46 All. 286 (292, 293), 78 I.C. 243, A.I.R. 1924 All. 365.

It is very difficult if not impossible to say with precision what constitutes an annexation to the land. It is a question which must depend upon the circumstances of each case and mainly on two circumstances as indicating the intention, *viz.*, the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered as a mere chattel—*Holland v. Hodgson*, (1872) L.R. 7 C.P. 328 (334).

See also Note 78 under sec. 8 and Note 579 under sec. 108 (h).

21. Actionable claim—*The following are actionable claims:—*

(a) Claim for arrears of rent—*Hiralal v. Tripura Charan*, 40 Cal. 650 (651); *Rameshwar v. Riknath*, A.I.R. 1923 Pat. 165, 67 I.C. 451; *Sheo Gobind v. Gouri*, 4 Pat. 43, 6 P.L.T. 139, A.I.R. 1925 Pat. 310, 83 I.C. 81. Even though the arrears of rent may be said to be a *charge* on the holding or tenure, still they cannot be said to be a debt secured by a *mortgage* of immoveable property—*Sheo Govind v. Gouri*, (*supra*).

(b) A claim for rent to fall due in *future* is an actionable claim, for it is an 'accruing' debt within the meaning of the definition—*Poothakka v. Annamalai*, 1926 M.W.N. 774, A.I.R. 1926 Mad. 1173, 98 I.C. 263; *Chidambaram v. Doraisami*, 31 I.C. 473 (Mad.).

(c) The benefit of an executory contract for the purchase of goods is a 'beneficial interest in moveable property' and is therefore an actionable claim within the meaning of this section—*Jaffer Meher Ali v. Budge-Budge Jute Mills*, 34 Cal. 289 (on appeal from 33 Cal. 702).

(d) A right to get by division a piece of land reserved by a donor for his own use in his deed of gift (but possession of which was with the donee) is an actionable claim—*Rudra Perkash v. Krishna Mohun*, 14 Cal. 241 (245).

(e) A share in a partnership—*In re Bainbridge*, 8 Ch. D. 218.

What are not actionable claims:—

(a) A decree is not an actionable claim. A debt is an actionable claim, but a debt which has already passed into a decree is not so—*Afjal*

v. Ram Kumar, 12 Cal. 610; *Dagadu v. Vanji*, 24 Bom. 502; *Govindarajulu v. Ranga Rao*, 40 M.L.J. 124, 62 I.C. 255. In *Annamalai v. Muthukaruppan*, 8 Rang. 645, 35 C.W.N. 145 (150) (P.C.), A.I.R. 1931 P. C. 9, the transfer of a *decree* obtained by a creditor of a deceased person against his estate, in an administration suit, was held to be a transfer of an actionable claim, in as much as the instrument of assignment transferred to the assignee all the interest of the transferor in the *monies* to be recovered under the decree.

(b) 'The right to sue for accounts and to recover money which might be found due on taking accounts from an agent is not an actionable claim because it is not a right to recover a *specific* sum of money but an *indefinite* amount which may or may not be found due on the taking of accounts; such a right is a mere right to sue (sec. 6) and is incapable of transfer—*Kshetra Mohan v. Biswa Nath*, 51 Cal. 972 (977), A.I.R. 1924 Cal. 1047, 82 I.C. 411.

(c) The right of a person to recover damages for the breach of a contract is merely a right to sue and is not an actionable claim which is capable of transfer—*Abu Mohomed v. S. C. Chunder*, 36 Cal. 345; *Iirachand v. Nemchand*, 47 Bom. 719 (720); *Nakhola v. Kokaya*, 69 I.C. 238 (Nag.); *Moti Lal v. Radhey Lal*, 1933 A.L.J. 1009, A.I.R. 1933 All. 642 (646).

(d) A claim to mesne profits is not an actionable claim but a mere right to sue (sec. 6), and therefore cannot be transferred—*Jai Narain v. Kishun Dutta*, 3 Pat. 575 (580), A.I.R. 1924 Pat. 551, 78 I.C. 705.

(e) Debts secured by mortgage of immoveable property or hypothecation of moveable property. See the words of the section. Before the T. P. Amendment Act II of 1900, these debts were included in actionable claim. See Note 17A *ante*, and *Rani v. Ajudhia*, 16 All. 315 (317). The Amendment Act of 1900 has changed the law.

But although under this definition, a secured debt does not fall within the meaning of actionable claim, it does not follow that a debt without the security cannot be made the subject of transfer at all. A debt is distinct from the security, and the debt can be transferred apart from the security—*Imperial Bank of India v. Bengal National Bank*, 59 Cal. 377 (P.C.), 35 C.W.N. 1034 (1039), A.I.R. 1931 P.C. 245, 134 I.C. 651.

Debt:—The term 'debt' includes a sum of money due by one person to another, and which is actually payable at the time, as well as a sum of money which is due though not actually payable then. It must be a perfected and absolute debt, and not merely a sum of money which *may or may not* become payable at some future time, or the payment of which depends upon contingencies which may or may not happen—*Haridas v. Baroda Kishore*, 27 Cal. 38; *Palikandy v. Krishnan Nair*, 40 Mad. 302 (303).

A debt which otherwise amounts to an actionable claim does not cease to be so merely because a cause of action in respect thereof has not arisen or because the time of its payment has not arrived. A claim to unpaid dower debt is an actionable claim—*Amir Hasan v. Muhammad Nazir*, 54 All. 499, 136 I.C. 833, A.I.R. 1932 All. 345 (347).

An uncertain sum cannot be included in the word 'debt'. Thus an uncertain right in an unascertained property cannot be the subject of assignment—*Bebee Tokai v. Davod Mullick*, 6 M.L.A. 510.

The assets of a partner, as yet unascertained, in a partnership business, which are in the hands of a receiver, cannot be assigned, since until the dissolution of partnership and the ascertainment of the share in the assets of the partners, such share cannot be treated as a debt—*Abott v. Abott*, 5 B.L.R. 382.

22. Notice:—The Transfer of Property Act contemplates three kinds of notice, namely (1) actual notice; (2) constructive or implied notice (*i.e.*, when but for wilful abstention from inquiry or search or for gross negligence he would have known); and (3) notice to agent.

Essentials of notice:—An actual notice, to constitute a binding notice, must be *definite* information given by a person *interested* in the thing in respect of which the notice is issued; for it is a settled rule that a person is not bound to attend to vague rumours or statements by mere strangers, and that a notice to be binding must proceed from some person interested in the thing—*Barnhart v. Greenshields*, 9 Moo. P.C. 18. A mere casual conversation in which knowledge of a certain thing is imparted, is not notice of it, unless the mind of the person has, in some way, been brought to an intelligent apprehension of the nature of the thing, so that a reasonable man or any ordinary man of business would act upon the information, and would regulate his conduct by it. In other words, the party imputing notice must show that the other party had knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—*per* Lord Cairns, L.C., in *Lloyd v. Banks*, L.R. 3 Ch. 488. A vague or general report or the mere existence of suspicious circumstances is not in itself notice of the matter to which it relates—*Weymouth v. Boyer*, 1 Ves. J. 425.

A *general* claim is not sufficient to affect a purchaser with notice of a deed of which he does not appear to have had knowledge—*Jolland v. Stainbridge*, 3 Ves. 478. Where a property which is subject to a mortgage is sold at a court-auction, *held* that in order to affect the purchaser, it must be shown that he had notice of the lien on it. The fact of the judgment-creditor having informed the court of it at some time or other for some purpose would be no evidence of notice on the auction-purchaser—*Nursing v. Roghoobur*, 10 Cal. 609. But if a person *knows* that another has or claims an interest in property for which he is dealing, he is bound to enquire what that interest is, and if he omits to do so, he will be bound, although the notice was inaccurate as to the particulars of the extent of such interest—*Gobinda Chunder v. Doorga*, 22 W.R. 248.

The notice must be given in the same transaction. A person is not bound by notice given in a previous transaction which he may have forgotten—*Wildgoose v. Weyland*, Gould 147; *Warrick v. Warrick*, 3 Atk 294. Notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction in which the instruments containing the recitals are not necessary to his title; but he is charged constructively with notice merely of that which affects the purchase of the property in the chain of title of which the paper forms the necessary link—*Bepin v. Jogeshwar*, 26 C.W.N. 36 (46), 34 C.L.J. 256, A.I.R. 1921 Cal. 730, 66 I.C. 345.

23. Constructive Notice:—Constructive or implied notice may be defined to be “knowledge which the Court imputes to a person, from

the circumstances of the case, upon a legal presumption, so strong that it cannot be allowed to be rebutted, that the knowledge must exist though it may not have been formally communicated"—*Hewitt v. Loosemore*, 9 Hare 449. "It may be considered to consist in those circumstances under which the Court concludes that notice must be imputed on grounds of public policy to an innocent person, or that the party has been guilty of such negligence in not availing himself of the means of acquiring it, as, if permitted, might be a cloak to fraud and which, therefore, the common interests of society require, should in its consequences, be equivalent to actual notice."—Dart's *Vendors and Purchasers* (6th Edn.), p. 971.

When a person is proved to have had knowledge of certain facts, or to have been in a position, the reasonable consequences of which knowledge or position would be that he would have been led to make further inquiry which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact. For there may be such wilful negligence in abstaining from inquiry into facts which would convey actual notice as may properly be held to have the consequence of notice actually obtained. But if there is no actual notice and no wilful or fraudulent turning away from an inquiry into and consequent knowledge of facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied—*Doorga v. Baney Madhub*, 7 Cal. 199 (201).

The Courts in India should be very careful about applying the English decisions in regard to constructive notice to this country, and should do so only when the circumstances are really similar. The cases of *Daniels v. Davison*, 16 Ves. 249, and *Barnhart v. Greenshields*, (1855) 9 Moo. P.C. 18, as well as other cases are freely quoted and applied by Indian Courts, and the result is that the doctrine of constructive notice is carried to great lengths. When the Indian Courts apply the principle that a man has notice because if he had made reasonable inquiries he would have ascertained the facts and if he has not ascertained the facts he has been guilty of gross negligence—the Courts must carefully regard all the circumstances of the case and of the people to whom the Courts are going to apply the principle—*Kalyani v. Krishnan*, 55 Mad. 519, 138 I.C. 78, A.I.R. 1932 Mad. 305 (309).

24. Wilful abstention:—The words "wilful abstention from inquiry and search" must be taken to mean such abstention from inquiry or search as would show want of *bona fides*—*Joshua v. Alliance Bank of Simla*, 22 Cal. 185. Cases in which constructive notice has been established resolve themselves into two classes: *first*, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, incumbrance or other circumstances affecting the property, of which he had actual notice; and *secondly*, cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice—*Jones v. Smith*, 1 Hare 43 (*per* Wigram V.C.); *Manji Karimbhai v. Hoorbai*, 35 Bom. 342 (348); *Puthenpurayil v. Kandiya*, 34 I.C. 906 (908); *Macneil & Co. v. Saroda Sundari*, 33 C.W.N. 526, 48 C.L.J. 374, A.I.R. 1929 Cal. 83. 114 I.C. 142.

Thus, a person refusing a registered letter sent by post must be deemed to have constructive notice of it, and he cannot afterwards plead ignorance of its contents, because he had wilfully abstained from receiving it and acquainting himself with its contents—*Lootf Ali v. Peary Mohun*, 16 W.R. 223; *Jogendra v. Dwarka*, 15 Cal. 681; *Ismail v. Kali Krishna*, 6 C.W.N. 134; *Edulji v. Collector*, 1 M.I.A. 295.

Wilful abstention from inquiry should be distinguished from *mere want of caution* in not making the inquiry, especially where the party who would have made the inquiry is misinformed as to the true state of facts, and the circumstances are not sufficient of themselves to arouse suspicion—*Damodara v. Somasundara*, 12 Mad. 429 (435); *Shan Maun Mull v. Madras Building Co.*, 15 Mad. 268 (279).

A prudent purchaser should not rest content with merely seeing a mutation entry, if it does not cover the whole of the land he is purchasing. He ought to ascertain what are the entries in the Record-of-Rights, and whether the vendor has got full proprietary right or mortgage-right. If he fails to do so, there is a want of care or a wilful abstention from inquiry or search, within the meaning of this section—*Harilal v. Mulchand*, 52 Bom. 883, 30 Bom.L.R. 1149, A.I.R. 1928 Bom. 427 (429). 113 I.C. 27. Where A proposes to sell his property to B who, at the same time, knows that rents due in respect of the property are paid by the tenants to a third person X, whose receipt is inconsistent with the title of the vendor, B will be fixed with notice of the rights of X, and if B abstains from prosecuting his inquiries his conduct will amount to wilful abstention—*Hunt v. Luck*, [1902] 1 Ch. 429. Similarly, it is the duty of a prudent mortgagee to search the register to ascertain the title to the property and the charges, if any, upon it. If the mortgagee does not search the register, he must be deemed to have wilfully abstained from making the search, or he has been guilty of gross negligence in not making it; and in either case he cannot be treated as a *bona fide* mortgagee without notice—*Churaman v. Balli*, 9 All. 591 (599). A purchaser of a tenancy should call for the title-deeds of the vendor, and if the lease provides for interest at a high rate the purchaser shall be taken to have had full knowledge of the terms of the lease and cannot afterwards complain that the rate of interest is exorbitant—*Hamiduddin v. Ramani Kanta*, 56 C.L.J. 590, A.I.R. 1933 Cal. 321 (322). A lessee has constructive notice of the lessor's title and his conduct in not enquiring into the matter amounts to wilful abstention—*Patman v. Harland*, L.R. 17 Ch. D. 253.

Where a certain property was at first mortgaged by deposit of title-deeds, and then a subsequent transferee (mortgagee or purchaser) took a transfer of the same property without inquiring whether the title-deeds were already pledged, *held* that the act of the transferee (subsequent mortgagee or purchaser) in taking a transfer in a place (Akyab) where mortgages by deposit of title-deeds were legal and usual, without ascertaining whether the title-deeds were already pledged, amounted to such abstention from inquiry which he ought to have made or such negligence as to infer notice in terms of this section—*Imperial Bank of India v. U Rai Gyaw Thu & Co. Ltd.*, 51 Cal. 86 (100) (P.C.), 1 Rang. 637, A.I.R. 1923 P.C. 211, 28 C.W.N. 470, 76 I.C. 910; *Kshetra Nath v. Harsukhdas*, 31 C.W.N. 703, A.I.R. 1927 Cal. 538 (543), 102 I.C. 871.

But the fact that a person is in occupation of a *small part* of a house does not put the purchaser on constructive notice of that person's rights

as to the whole house, and the failure of the purchaser to inquire from everybody in the house as to what their title may be in the house, does not amount to wilful abstention or gross negligence. To suggest that it is the duty of the proposed mortgagee or purchaser of a house to attend on the premises and examine narrowly every one of those persons would be casting upon him an intolerable burden, and to hold that he was affected by constructive notice of all these persons' possible equitable rights over any part of the premises would be an undue extension of the doctrine of constructive notice—*Parthasarathy v. Subbaraya*, 45 M.L.J. 175, A.I.R. 1924 Mad. 67 (69), 72 I.C. 559. If further inquiry into title in respect of a small part of the estate would have revealed a defect in title as to the whole estate, the purchaser is not to be held to have constructive notice of that defect—*Hunter v. Walters*, (1871) 7 Ch. 75, 25 L.T. 765.

A person cannot be fixed with constructive notice where the circumstances are such that he is not bound to make any inquiry. Thus, where a registered sale-deed recited that the consideration was fully paid, and there was also an endorsement, at the foot of the deed, of a receipt of the purchase-money in full, a person taking a mortgage of the property from the purchaser was not bound to inquire whether the full purchase-money had been actually paid or not but was entitled to rely upon the representation in the sale-deed. If he does not make such inquiry, he cannot be guilty of "wilful abstention from inquiry or gross negligence," and the vendor cannot enforce against him his lien for unpaid purchase-money under sec. 55 (4) (b)—*Tehilram v. Kashibai*, 33 Bom. 53 (68, 69), 10 Bom.L.R. 403, 1 I.C. 614.

25. Negligence:—Negligence may be stated to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do—*Blyth v. Birmingham Water Works Co.*, 11 Ex. p. 784. It means the absence of such care, skill and diligence, as it is the duty of the person to bring to the performance of the work which he is said not to have performed—*per* Willes, J., in *Grill v. General Iron Screw Collier Co.*, 35 L.J.C.P. 330.

No general definition of "gross negligence" has been or can be laid down. Each case must depend upon the facts proved in it and reasonable inferences from such facts—*Damodara v. Somasundara*, 12 Mad. 429 (431). The term "gross negligence" is nowhere defined in this Act, but in sec. 78, gross neglect, fraud and misrepresentation have been used as equivalent in their legal consequences. See *Shan Moun Mull v. Madras Building Company*, 15 Mad. 268 (276). "Gross negligence" is a degree of negligence so gross that a Court of Equity may treat it as evidence of fraud—impute a fraudulent motive to it—and visit it with the consequences of fraud, although morally speaking the party charged may be perfectly innocent—*West v. Reid*, 2 Hare 257 (*per* Wigram V.C.). The conduct in question need not be such as would entail a jury to find that there has been actual fraud, but must be characterised by negligence so gross as would justify the Court in concluding that there has been fraud in an artificial sense of the word—*Oliver v. Hinton*, [1899] 2 Ch. 264 (275). See also Note 479 under sec. 78.

Where a property which was subject to a charge in favour of A was subsequently mortgaged to B, and the circumstances were such that if the slightest pains had been taken by the mortgagee to investigate the title of the mortgagor the said charge would certainly have been discovered, the mortgagee must be deemed to have had constructive notice of the charge—*Bank of Bombay v. Suleiman*, 33 Bom. 1 (P.C.).

Where a sale-deed is deposited by the vendee as a collateral security and the sale-deed itself shows that a part of the purchase-money was not paid by the vendee, and that he had undertaken therewith to discharge the debts of the vendor, the person accepting the deed as collateral security is under a duty to inquire whether the vendee has paid the balance of the purchase-money by discharging the debts of the vendor, and if the vendee had not in fact so paid the balance, the equitable mortgagee must be held to be a transferee with notice of the vendor's lien for the unpaid purchase-money—*Alwar Chetty v. Jagannath*, 54 M.L.J. 109, 108 I.C. 291, A.I.R. 1928 Notes 56.

If a person neglects to call for deeds and documents of title, it will amount to gross negligence, and the doctrine of constructive notice will apply against him—*Doorga Narain v. Baney Madhub*, 7 Cal. 199 (201). The wilful or negligent abstention on the part of the vendee to call for the title deeds will deprive him of the protection which a Court of Equity would extend to a *bona fide* purchaser for value without notice—*Ram Charan v. Joy Ram*, 17 C.W.N. 10, 16 I.C. 825. The omission on the part of an intending mortgagee to search the register to ascertain the title to the property or the charges (if any) upon it, amounts to gross negligence on his part—*Churaman v. Balli*, 9 All. 591 (599).

A purchaser may be guilty of negligence in not enquiring into the title-deeds or the earlier title of the property which he has contracted to buy. But he cannot be said to be guilty of negligence (and cannot therefore be fixed with constructive notice) in not asking for the title-deeds of an adjoining property which *prima facie* he has no right whatever to ask his vendor to produce. As between the vendor and the purchaser, it is the vendor who is to disclose to the purchaser any covenant restricting the enjoyment of the property sold—*Chaturbhuj v. Mansukhram*, 27 Bom. L.R. 73, 86 I.C. 19, A.I.R. 1925 Bom. 183.

This section speaks of *gross* negligence. Any *slight* negligence on the part of a person does not fix him with constructive notice—*Damodara v. Somasundara*, 12 Mad. 429 (435).

26. Registration, whether amounts to notice—Old law:—According to the Calcutta High Court, registration was not of itself a sufficient notice—*Joshua v. Alliance Bank of Simla*, 22 Cal. 185; *Inderdewan v. Gobind Lal*, 23 Cal. 790; *Preo Nath v. Asutosh*, 27 Cal. 358; *Magniram v. Mehdi Hossein*, 31 Cal. 95 (102); *Atul Kristo v. Mutty Lal*, 3 C.W.N. 30; *Nanda Lal v. Abdul Aziz*, 43 Cal. 1052 (1084). The same view was taken by the Madras High Court in *Shan Maun Mull v. Madras Building Co.*, 15 Mad. 268 (279); *Madras Building Co. v. Rowlandon*, 13 Mad. 383 (388); *Damodara v. Somasundara*, 12 Mad. 429 (435); *Rangasami v. Annamalai*, 31 Mad. 7 (10).

In *Manindra v. Troylukho*, 2 C.W.N. 750 (755) and *Bunwari v. Ramjee*, 7 C.W.N. 11, the Calcutta High Court held that the question whether registration amounts to notice was one of fact and must be decided according to the particular circumstances of each individual case. And this

view was approved of by the Privy Council in *Tilakdhari v. Khedan Lal*, 48 Cal. 1 (at pp. 15-16).

The Allahabad High Court laid down that registration was of itself no notice to all the world, but where it was the duty of a person to search or where a reasonably prudent man would in his own interests make a search, then the fact that the search if made would have disclosed a document affecting the property, would affect that man with notice of that document and put on him the necessity of further inquiry—*Janki Prasad v. Kishen Dat*, 16 All. 478 (482). In this case the prior mortgagee bringing a suit on his mortgage was held to have had constructive notice of a subsequent registered incumbrance affecting the property mortgaged to him, in as much as it was his duty before suing on his mortgage to search the registry for the record of any subsequent incumbrance, and to implead the subsequent mortgagee. This case has been followed in *Ashiq Husain v. Chaturbhuj*, 50 All. 328, 26 A.L.J. 41, 108 I.C. 152, A.L.R. 1928 All. 159.

The Bombay High Court holds that registration of a sale or mortgage gives notice to the subsequent purchasers or mortgagees—*Lakshman v. Basrat*, 6 Bom. 168; *Dundaya v. Chenbasapa*, 9 Bom. 427; *Chintaman v. Dareppa*, 14 Bom. 506 (510); *Narayan v. Bapu*, 17 Bom. 741; *Balmukund v. Moti*, 18 Bom. 444; *Chunilal v. Ramchandra*, 22 Bom. 213; *Dina v. Nathu*, 26 Bom. 538. But see *Gordhandas v. Mohanlal*, 45 Bom. 170 (173), 59 I.C. 506.

The Lahore High Court held that although registration did not amount to constructive notice, still where there was the universal practice to consult the public registers, the omission by the transferee to consult the public registers to ascertain whether the properties transferred to him were encumbered, would throw doubt upon the *bona fides* of the transferee, and amount to a *gross neglect* on his part, which would attract to him the effects of notice—*Punjab Banking Co. v. Md. Hassan*, 6 Lah. 344, 89 I.C. 615, A.I.R. 1925 Lah. 542.

The Privy Council ruling in 48 Cal. 1 has been followed in *Parbhu Lal v. Chatter*, 88 I.C. 398, A.I.R. 1925 All. 557; *Kali Din v. Madho*, 77 I.C. 862, A.I.R. 1923 All. 169; *Ghulam Muhammad v. Mirza*, 5 Lah. 368, 84 I.C. 174; *Gunabai v. Motilal*, 89 I.C. 625 A.I.R. 1925 Nag. 398; *Chettiar Firm v. Chettiar Firm*, 4 Rang. 238, A.I.R. 1926 Rang. 195, 98 I.C. 19.

Under the present law, registration amounts to notice:—See Explanation I. The reasons have been thus stated by the *Special Committee*:—

“There is a conflict of decisions whether the registration of a document under the Indian Registration Act is of itself constructive notice of the transaction effected by the document. The High Courts of Bombay and Allahabad hold that it is (I.L.R. 6 Bom. 168; 9 Bom. 427; 26 Bom. 538; 16 All. 478). The Madras High Court holds that registration does not amount to notice in any case. In I.L.R. 15 Mad. 268, it was observed that if the Legislature desired to regard registration as notice, it would have said so in express words. In some cases the Calcutta High Court took the same view as the Madras High Court (I.L.R. 23 Cal. 790; 27 Cal. 7). In 2 C.W.N. 750, Sir Lawrence Jenkins observed:—

‘Apart from authority, I should have thought, having regard to the statutes applicable in this country, that the proposition involved is not one of law but of fact, and that as each case arises it

should be determined whether in that individual case the omission to search a register, taken together with other facts, amounts to such gross negligence as to attract the consequence which results from notice; and it well may be that this test will serve to reconcile the apparent conflict of view that at first sight the cases suggest.'

"Following that decision in 7 C.W.N. 11, the same High Court held as follows:—

'Whether registration is or is not notice in itself depends, we think, upon the facts and circumstances of each case, upon the degree of care and caution which an ordinary prudent man would necessarily take for the protection of his own interest by search into the registers kept under the Registration Act.'

"The question was considered by the Judicial Committee in *Tilakdhari v. Khedan Lal*, (47 I.A. 239, 48 Cal. 1). After reviewing all the Indian decisions, their Lordships of the Privy Council approved of the view taken in the Calcutta cases in 2 C.W.N. 750 and 7 C.W.N. 11, and observed:—

'Their Lordships are impressed with the view that, since registration has for nearly two centuries been held not to operate as constructive notice in this country, and the knowledge of this law, which was then old, must have been present to the Indian Legislature when they framed the different Indian Registration Acts and the definition of notice in the Transfer of Property Act, yet none the less they have omitted to state the principle for which, according to the appellant's contention, it is essential that the register should provide . . . For these reasons their Lordships think that notice cannot in all cases be imputed from the mere fact that a document is to be found upon the Indian register of deeds.'

"The test laid down in 2 C.W.N. 750 and approved by the Privy Council would, as stated by Sir Rash Behary Ghose, inevitably lead to much perjury and litigation. (Ghose on Mortgage, Vol. I, p. 473). At page 252 of the report in *Tilakdhari's* case, the Judicial Committee also observe that the real purpose of registration is to secure that every person dealing with property, where such dealings require registration, may rely with confidence upon the statements contained in the register as a full and complete account of all transactions by which his title may be affected, unless indeed he has actual notice of some unregistered transaction which may be valid apart from registration.

"In America, registration of a conveyance has been deemed to operate as constructive notice to all subsequent purchasers of any estate legal or equitable in the same property. The reason assigned for the application of this doctrine is as follows:—

'The reasoning upon which this doctrine is founded is the obvious policy of the Registry Acts, the duty of the party purchasing under such circumstances to search for prior encumbrances, the means of which search are within his power, and the danger of letting in parol proof of notice or want of notice of the actual existence of the conveyance. This doctrine certainly has the advantage of certainty and universality of application; and it imposes upon the subsequent purchasers a reasonable degree of

diligence only in examining their titles to estates.' (Story on Equity Jurisprudence, Art. 534, pp. 510 and 511).

"In England also in the counties of Middlesex and Yorkshire, where the system of local deed Registries prevails, section 197 of the Property Act, 1925, provides that registration in a local deed Registry of a memorial of any instrument transferring or creating a legal estate or charge shall be deemed to constitute actual notice of the transfer or the creation of the legal estate or charge to all persons and for all purposes whatsoever as from the date of registration and so long as the registration continues in force. So also under section 198 in the case of instruments which are registered under the Land Charges Act, 1925, it has been provided that registration shall be deemed to constitute actual notice of such instrument to all persons and for all purposes connected with the land affected.

"In our opinion, in a country like India, where the system of registration has been generally applied, if registration is to be held as not implying notice, one of the objects for which instruments are required to be registered would be defeated. It is, therefore, necessary that express provision should be made in the Act making it clear that registration of an instrument relating to immoveable property amounts to notice of the instrument from the date of the registration. For this purpose we propose to add Explanation I to the definition of 'Notice' in section 3".—*Report of the Special Committee (1927)*.

"Or if the instrument has been registered under sub-sec. (3) of section 30" etc.:—These words in Explanation I provide for those cases in which the document has not been registered at the place where the property is situate. In such cases, the provision that the registration of a document amounts to notice *from the date of registration* will cause difficulties, and it is therefore provided that registration will amount to notice from the date on which a memorandum thereof has been filed by the Sub-Registrar under sec. 66 of the Registration Act. (*Report of the Select Committee, 1929*).

"Where the property is not all situated in one sub-district," etc.:—These words as well as the last three lines, in Explanation I, and the words "or memorandum" in proviso (2) have been added by the Transfer of Property Amendment Act V of 1930.

The reasons for the amendments have been thus stated:—

"The amendments contained in this Bill are designed to carry out the intentions of Explanation 1. The difficulties sought to be met by the latter part of the body of the Explanation are not confined to cases where registration is effected under sub-section (2) of sec. 30 of the Indian Registration Act, 1908, but they are also encountered when an instrument relating to scattered properties is registered in the ordinary manner. Further, it is possible that a subsequent transferee may make a genuine search in the offices of all the sub-districts in which the property he seeks to acquire is situated, and find no record of a transfer; but may still find himself saddled with notice of a transfer by reason of a memorandum relating to some other property included in a previous transfer along with the property he is interested in, having been filed in some distant sub-district. The Bill is intended to remove these anomalies."—*Statement of Objects and Reasons (Gazette of India, 1930, Part V, p. 15)*.

27. Registration, how far notice:—If a conveyance is registered, the register would be notice of the registered document; but it would be

pushing the doctrine of constructive notice too far to hold that it would be notice also of the unregistered documents under which the holders of the registered document derived their title—*Chunilai v. Ramchandra*, 22 Bom. 213 (216). Registration is constructive notice of the registered document itself, but it cannot operate as notice of the unregistered instruments which are recited in the registered instrument and from which the holder of it derives his title—*Sharfuddin v. Govind*, 27 Bom. 452 (467).

Registration is constructive notice to *subsequent* mortgagees or purchasers, but it cannot constitute notice to a *prior* mortgagee. Therefore where a prior mortgagee having had no notice of the mortgage (though registered) made in favour of the puisne mortgagee, fails to implead him in the mortgage suit, the proceedings will not be invalid—*Ram Narain v. Bandi Pershad*, 31 Cal. 737 (742).

Registration of a sub-mortgage does not amount to notice to the original mortgagor. Therefore where a mortgagor who had no actual notice of a registered sub-mortgage makes a payment in good faith to the mortgagee, the payment is not vitiated, notwithstanding the fact that such payment was made subsequent to the registration of the sub-mortgage. The registration is notice for some purposes, but it cannot be treated as notice for the purpose of vitiating payments made by a mortgagor to his mortgagee without actual notice of the sub-mortgage—*Sahadev v. Shekh Papa Miya*, 29 Bom. 199 (202), following *William v. Sorrell*, (1799) 4 Ves. 389.

28. Possession amounts to notice:—See Explanation II. .

“It is not clear how far possession is to be regarded as notice. In some cases it has been held that possession amounts to such notice of title as the person in possession may have (I.L.R. 25 All. 366; 16 Mad. 148). In other cases, Courts have felt difficulty in expressing any opinion on the point (I. L. R. 8 Cal. 597). Possession which operates as notice, however, must be actual possession. It does not seem reasonable that a person entering into a transaction regarding immoveable property should be in a position to ignore the question of possession or should neglect to inquire into the nature of the possession or the title of the person who is in actual possession of such property, if he is not the person with whom he is dealing. We propose to add Explanation II to the definition of ‘notice’, providing that the person dealing with any immoveable property shall be deemed to have notice of the title of any person who, for the time being, is in actual possession thereof. It may be noted that notice in this case is not extended to possession which is merely of a *constructive* nature. The explanation is in accordance with Illustration 3 to section 27 (b) of the Specific Relief Act.”—*Report of the Special Committee (1927)*.

Possession amounts to notice of such title as the person in possession may have; and any other person who takes a mortgage or other charge upon or purchases or takes a lease of the immoveable property without ascertaining the nature and extent of the claim or interest of the person in possession, does so at his own risk—*Lakshman Das v. Basrat*, 6 Bom. 168 (188); *Sharfuddin v. Govind*, 27 Bom. 452 (470); *Jugal Kissore v. Kartic*, 21 Cal. 116 (120); *Kondiba v. Nana*, 27 Bom. 408; *Bisheshar v. Muirhead*, 14 All. 362 (364); *Shobhagchand v. Bhaichand*, 6 Bom. 193. If the property to be sold is not in the possession of the vendor but of another person, it is the duty of the purchaser to make enquiries

from that person, and he is bound by all the equities which the party in possession may have in the property—*Balchand v. Bulaki*, 8 Pat. 316, 117 I.C. 170, A.I.R. 1929 Pat. 284. “If a purchaser or a mortgagee had notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession—of the tenant who is in possession—and find out from him what his rights are. And if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the right of the tenant in possession”—*per* Vaughan-Williams, L.J., in *Hunt v. Luck*, [1902] 1 Ch. 428. “If a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the person in such occupation may have in the land”—*per* Wigram, V.C., in *Jones v. Smith*, 1 Hare 43 (60). Where a tenant is in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and these equities extend not only to the interests connected with the tenancy but also to interests under any collateral agreement—*Barnhart v. Greenshields*, 9 Moo. P.C. 18. If a tenant is in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity repelling the claim of a subsequent purchaser who makes no enquiry as to the nature of his possession—*Daniels v. Davison*, (1809) 16 Ves. 247. Possession being *prima facie* evidence of title and also the only visible badge of ownership, a man in possession is entitled to impute knowledge of that possession to all who may have to deal with any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held—*Barnhart v. Greenshields*, 9 Moo. P.C. 18; *Holmes v. Powell*, 8 DeG.M. & G. 572. Constructive notice of all the rights of the person in possession of a property sold or mortgaged is to be imputed to the purchaser or mortgagee of that property who made no enquiry of the person in occupation. This rule is based on the principle that where another is in exclusive possession which would *prima facie* be inconsistent with the full rights of the vendor or mortgagor, and the purchaser or mortgagee does not choose to ask what that possession is, he must be taken to have got the information that he would have obtained if he had asked. But the unknown occupation of a *portion* of the premises by a tenant or other person does not put the purchaser or mortgagee on inquiry as to the possible right of the occupier over the *remainder* of the premises—*Parthasarathy v. Subbarayya*, 45 M.L.J. 175, 72 I.C. 559, A.I.R. 1924 Mad. 67 (69). The possession by a person, who entered into an agreement for the purchase of the land, of a *portion* of the land, does not amount to constructive notice of the agreement to subsequent purchasers in respect of the entire property—*Hari Charan v. Kaula*, 2 P.L.J. 513, 40 I.C. 142.

Where the mortgagor contracted to sell the mortgaged property to the mortgagee (who was in possession) but subsequently sold it to a third person who did not enquire as to possession, and then the mortgagee sued for specific performance of the contract of sale, *held* that the purchaser having knowledge of the mortgagee being in possession and having made no inquiries as to why he was in possession must be taken to have had constructive notice of all the equities in favour of the mortgagee—*Faki Ibrahim v. Faki Gulam*, 45 Bom. 910, A.I.R. 1921 Bom. 459, 60 I.C. 986. Where a prior usufructuary mortgagee was in possession under an

unregistered instrument, which was not compulsorily registrable, a subsequent mortgagee under a registered instrument must be presumed to have had notice of such possession, and could not claim priority over the holder of the unregistered instrument—*Bhikhi Rai v. Udit Narain*, 25 All. 366 (370); *Krishnamma v. Suranna*, 16 Mad. 148 (170).

A person who holds an *unregistered* deed of sale (the registration of which is not compulsory) and is in *possession* of the property conveyed, has a superior title to one who sets up a *registered* conveyance of a later date *unaccompanied* by possession, the subsequent purchaser presumably having notice of title of the first purchaser from the fact of possession having been given. This subject is fully discussed in Note 291 under sec. 54.

If there is a tenant upon the property, his open possession is notice not only of the immediate terms of his tenancy, but of collateral agreements as well, in the absence of an enquiry by the transferee—*Tiloke Chand v. Beattie & Co.*, 94 I.C. 538, A.I.R. 1926 Cal. 204.

Possession gives notice of the interests of the person in possession but not those of any one under whom he holds. Therefore, where land is in the occupation of the tenant, the notice of the tenancy is not notice of the title of the *lessor* under whom the tenant holds. The purchaser having notice of the tenancy is liable to any equity which the tenant in occupation can raise against him, but he is not bound by the notice of the lessor's title—*Gunamoni v. Bussunt Kumari*, 16 Cal. 414 (417). "There is no authority for the proposition that notice of a tenancy is notice of the title of the lessor, or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on"—*Barnhart v. Greenshields*, 9 Moo. P.C. 18.

In benami purchases, possession or receipt of rent is an important criterion in determining the question whether the purchase was benami or not. When the real owner has all along remained in possession and enjoyment of the property, that circumstance is constructive notice of the benami nature of the transaction—*Ram Sarup v. Maya Shankar*, 46 P.R. 1918, 43 I.C. 556.

Possession, in order to operate as notice, must be actual possession *at the time the subsequent interest is created*, for a party cannot be expected to take notice of some previous possession which may have been determined. So, a purchaser under a registered sale-deed has priority over a prior purchaser under an unregistered sale-deed, who had *lost possession* at the time of the execution of the second sale-deed—*Mauladan v. Raghunandan*, 27 Cal. 7; *Shivram v. Saya*, 13 Bom. 229; *Sheo Narain v. Darbari*, 2 C.W.N. 207.

Constructive possession is not notice:—Possession, in order to be equivalent to notice, must be *actual* and not merely *constructive*. Constructive possession by a person purchasing under an unregistered instrument is not possession of such a nature as to be notice of his prior title to a subsequent purchaser under a registered deed—*Chunilal v. Ramchandra*, 22 Bom. 213 (216). See the Report of the Special Committee cited at p. 30 *ante*.

30. Notice of a deed is notice of its contents:—Actual notice of a deed is also constructive notice of all the material facts affecting the property, which appear on the face of the deed or could be reasonably inferred from its contents—*Talner v. Flouner*, 1 Ch. C. 269; *Moore v. Bennett*, 2 Ch. C. 246.

Moreover, actual notice of an instrument affecting one's title is constructive notice of all documents which are recited in the instrument and which an examination of the instrument would have brought to his knowledge, provided the documents relate to title and *form part of the chain of title*—*Patman v. Harland*, 17 Ch. D. 353. Thus, where the purchaser's attention was drawn by the recitals in the sale-deed to the existence of a deed of partition under which the vendor had acquired his title, the omission on the part of the purchaser to ascertain the contents of the partition-deed was construed as wilful abstention from inquiry which he ought to have made. The purchaser was therefore imputed with constructive notice of a covenant for pre-emption contained in the deed of partition, which gave a right of pre-emption to either of the co-sharers, whenever the other should sell his share—*Raja Ram v. Krishnasami*, 16 Mad. 301.

Attestation does not amount to notice:—The above rule applies only to the parties to an instrument, and not to the attesting witnesses. A witness subscribing to a deed need not know the contents of the deed, for a witness in practice is not privy to the contents of the deed—*Hipkins v. Amery*, 2 Gif. 212; *Beckett v. Cordley*, 1 Ves. J. 55. Therefore, attestation of a document does not by itself import consent to or knowledge of the contents of the document, nor fix him with notice of its provisions—*Mollaya v. Krishnaswami*, 47 M.L.J. 622, A.I.R. 1925 Mad. 95, 85 I.C. 855; *Rama Aiyar v. Narayanasami*, 51 M.L.J. 313, A.I.R. 1926 Mad. 609, 96 I.C. 483; *Bepin Behari v. Trailakya*, 31 C.W.N. 448 (449), A.I.R. 1927 Cal. 933, 102 I.C. 398; *Tarabaz v. Nanak Chand*, 33 P.L.R. 685, A.I.R. 1932 Lah. 566, 138 I.C. 263; *Hamidmiya v. Nagindas*, 35 Bom.L.R. 252, A.I.R. 1933 Bom. 217 (220); *Fazal Hussain v. Jiwan Shah*, 14 Lah. 369, 141 I.C. 454, A.I.R. 1933 Lah. 551 (553); *Banga Chandra v. Jagat*, 44 Cal. 186 (199) (P.C.). For it constantly happens that persons subscribe deeds as witnesses without having the least notion of what they contain, and if people were to be held bound by an instrument which they so subscribe, it might be a dangerous thing to witness any other man's signature—*per* Garth, C.J., in *Ram Chunder v. Hari Das*, 9 Cal. 463 (468); *Abhoy Charn v. Attarmani*, 13 C.W.N. 931, 3 I.C. 415. But there may be circumstances under which the witness may be deemed to have notice of the contents of the document he is attesting—*Tarabaz v. Nanak Chand*, *supra*. Thus, where the attestor was *present throughout* the transaction and attested the deed after *hearing its contents*, he must be fixed with notice of its contents, and cannot afterwards challenge the right of the transferee—*Bhagwat Rai v. Gorakh*, A.I.R. 1934 Pat. 93 (95).

31. Government:—The doctrine of constructive notice is equally applicable to Government, but the Court should be more strict in applying it to Government than to private individuals, and it must be more cautiously applied as it is based on a fiction—*Secretary of State v. Dattatraya*, 3 Bom. L.R. 923.

32. Notice to agent:—The law as to when notice to an agent amounts to notice to the principal, has been amended by Explanation III.

“The last portion of the existing definition of notice which relates to notice through an agent seems to us to be defective. It provides that a person has notice of the fact when information of the fact is given to or obtained by his agent under the circumstances mentioned in section 229 of the Indian Contract Act. The words “given to or obtained by his

agent" used in the definition suggest that the rule is restricted to the facts of which the agent has actual knowledge, or, in other words, express notice. (*Vide* observations of Pontifex, J., in I.L.R. 4 Cal. 897). The reference to section 229 of the Indian Contract Act does not extend the scope of the definition. That section merely provides that in order that notice to an agent should be notice to a principal, it must be given to or the information must be obtained by the agent in the course of business transacted by him for the principal. According to a well-established principle, the general rule is that an agent stands in the place of the principal for the purpose of the business in hand, his acts and knowledge being considered as the acts and knowledge of the principal. As observed by the Judicial Committee in *Rampal Singh v. Balbaddar Singh*, (29 I.A. 203, 25 All. 1), "it is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or (in other words) the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings." In *Mohori Bibee v. Dhurmodas Ghose* (30 I.A. 114, 30 Cal. 539), their Lordships of the Privy Council held that, although the principal was absent from Calcutta and personally did not take part in the transaction, his agent in Calcutta stood in his place for the purposes of the transaction and the acts and knowledge of the latter were the acts and knowledge of the principal. If notice to the agent, whether actual or constructive is not made notice to the principal, it has been said that notice would be avoided in every case by employing agents. [*Berwick & Co. v. Price*, (1905) 1 Ch. 632].

"The general rule that the knowledge of the agent is the knowledge of the principal has no doubt certain limitations. It is necessary that the matter for which the agent was employed should be taken into consideration. It is necessary that the agent should be acting in the course of the particular business for which he was employed. (34 I.A. 179, 31 Bom. 566). This general principle is now embodied in section 199 of the English Property Act, 1925. We propose therefore, to add Explanation III to the definition."—*Report of the Special Committee* (1927).

"We have added provisions to the effect that the notice must be of a fact which is material to the course of the business in which the agent is engaged, and that the agent must not have fraudulently concealed the fact from his principal."—*Report of the Select Committee* (1929).

✓ To affect the principal with notice, five things are necessary:—
 (a) The agent must have received the notice during the agency; (b) The knowledge must come to him as agent; (c) It must be in the same transaction; (d) It must be material to the transaction; (e) It must not have been fraudulently withheld from the principal—*Kettlewal v. Watson*, 21 Ch. D. 685 (706).

The information must be communicated to the agent as such; for information not so derived was not obtained in the course of the business transacted by him for his principal, and which he was not bound to disclose to him. See Ill. (b) to sec. 229, Contract Act. "Where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as the officer of one company will not be imputed to the other company unless he has some duty imposed upon him to communicate his knowledge to the company sought to be affected by the notice, and some

duty imposed upon him by that company to receive the notice"—Gour's *Law of Transfer*, 6th Edition, Vol. I, p. 112. Knowledge of an agent acquired in a matter for which he was not agent, and in a transaction of a date before the agency commenced, cannot be imputed to the principal—*Chabildas v. Dayal Mowji*, 31 Bom. 566 (P.C.), 34 I.C. 179.

Enactments relating to contracts to be taken as part of Contract Act.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872:

And sections 54, paragraphs 2 and 3, 59, 107, and 123 shall be read as supplemental to the Indian Registration Act, 1908.

33. The second para. of this section was added by the Transfer of Property Amendment Act III of 1885.

Before this para. was added, a difficulty arose that while section 54 (para. 3) of the Transfer of Property Act enacted that the sale of immoveable property of value less than Rs. 100 could be made either by a registered instrument or by delivery of the property, the Indian Registration Act only enacted in favour of compulsory registration of the instruments of sale of the value of Rs. 100 and upwards, and thus the provisions of the two Acts were so far in conflict that in the case of sales of less than Rs. 100, while the T. P. Act had the effect of abolishing optional registration (*Narain v. Dataram*, 8 Cal. 597, 612), the other Act still purported to create a valid title by an unregistered conveyance. Thus, while an unregistered sale-deed of property of less than Rs. 100 would convey a good title under the Registration Act, it would be wholly ineffectual under the T. P. Act, unless it was accompanied by delivery of possession.

This difficulty has now been removed and section 54 has been made supplemental to the Registration Act. That is, in order to make a valid transfer of property, the executant will have to conform to the provisions of the Transfer of Property Act, and not to the provisions of the Registration Act alone. The effect of the addition of the second para. of this section has been to make section 54 (para. 3) absolute, in so far as it prescribes that a sale of immoveable property of value less than Rs. 100 can be made only by a registered instrument or by delivery of the property, and that if made otherwise, *e.g.*, by an unregistered instrument unaccompanied by delivery of possession, the sale is inoperative and confers no title on the vendee—*Makhan Lal v. Bunku*, 19 Cal. 623 (626) (F.B.) (overruling *Khatu Bibi v. Madhuram*, 16 Cal. 622). The effect of secs. 4 and 54 of the T. P. Act is that if a sale of immoveable property is made by a written instrument, the instrument is compulsorily registrable, irrespective of the value of the property comprised therein—*Muthu Karuppan v. Muthu Samban*, 38 Mad. 1158 (1161), 25 I.C. 772, 27 M.L.J. 497; *Sohan Lal v. Mohan Lal*, 50 All. 986 (F.B.), 26 A.L.J. 1084, A.I.R. 1928 All. 726 (729).

Charge:—This section has nothing to do with charges, because a charge is outside the domain of the Registration Act and is valid even though unregistered—*Manekchand v. Ganeshlal*, 35 Bom.L.R. 588, 145 I.C. 582, A.I.R. 1933 Bom. 298 (299).

34. Lease:—A lease for a period of less than a year, if made in writing, must be registered under sec. 107 of the T. P. Act, though it is

not compulsorily registrable under sec. 17 of the Registration Act—*Rama Sahu v. Gowro*, 44 Mad. 55 (64) (F.B.), 59 I.C. 350.

35. Contract Act:—Notwithstanding the terms of this section, the provisions of sec. 39 of the Contract Act does not apply to the case of a mortgage so as to enable the mortgagor to rescind the mortgage, on the ground of non-payment of a part of the consideration, when an interest in the mortgaged property has actually vested in the mortgagee upon execution and registration of the mortgage-deed—*Makhan Lal v. Hanuman*, 2 P.L.J. 168 (171), 38 I.C. 877.

It is significant that the whole of the Contract Act has not been made applicable to a transfer of immovable property. This section merely makes certain provisions of the T. P. Act relating to contracts as part of the Contract Act, and not *vice versa*. There is a clear distinction between a contract which still remains to be performed and specific performance of which may be sought, and a conveyance by which title to property has actually passed. Cases of mere contract are governed by the provisions of the Contract Act. Cases of transfer of immovable property are governed by the Transfer of Property Act. A mere contract to mortgage or sale would not amount to an actual transfer of any interest in the immovable property (see sec. 54), but a deed of sale or mortgage, if duly registered, would operate as a conveyance of such interest. Once a document transferring immovable property has been registered, the transaction passes out of the domain of a mere contract into one of conveyance. Such a completed transaction would be governed by the provisions of the Transfer of Property Act and of only so much of the Contract Act as are applicable thereto—*Dip Narayan v. Nageshar*, 52 All. 338, 1930 A.L.J. 45, A.I.R. 1930 All. 1 (2), 122 I.C. 872.

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A)—*Transfer of Property, whether Movable or Immoveable.*

5. In the following sections “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, *or to himself*, or to himself and one or more other living persons; and “to transfer property” is to perform such act.

In this section ‘living person’ includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

Amendment:—The italicised words have been added by sec. 6 of the Transfer of Property Amendment Act (XX of 1929). For reasons, see Note 40 below.

36. "Act of parties":—The word "transfer" is not concerned with transfers which take place by judicial process, but with such transfers only as take place between living persons by virtue of their own voluntary acts—*Gopal Pandey v. Parsotam Das*, 5 All. 121 (137).

Not confined to contracts:—There is nothing in this Act to suggest that it was intended to confine the operation of the Act to transfers by contract. The only thing one has to look to is whether the deed does or does not purport to be an act conveying property, and if it does, it is a deed or act of transfer within the meaning of this Act—*Joshua v. Alliance Bank*, 22 Cal. 185 (202). Thus, the term is wide enough to include a deed of appointment executed by virtue of a power given under a settlement—*Ibid.*

37. Transfer:—The term 'transfer' is used in law in the most generic signification comprehending all the species of contract which pass real rights in property from one person to another—*Gopal Pandey v. Parsotam*, 5 All. 121 (137); *Mata Din v. Kazim*, 13 All. 432 (473) (*per* Mahmood, J.). The word has long been recognised to be a technical term of law in all countries where English is the language of the Legislature and of the Courts of Justice. It is often used as a convertible term with *alienation*, *conveyance* and *assignment*—*per* Mahmood, J., in 5 All. 121 (137).

The term 'transfer' does not necessarily import conveyance of *all* the transferor's interest in the property. Thus, a mortgage or a lease is treated as a transfer under the Act, although it does not exhaust the whole interest which the transferor is capable of passing—*Narandas v. Parsoram*, 4 B.L.R. 550.

Where, in a dispute regarding her husband's property, a Hindu widow arrived at a compromise with the reversioner whereby she agreed to keep the property for her life and undertook not to sell or mortgage the same and that any such sale or mortgage if made would be invalid, and she also consented that after her death the reversioner would be the owner of the property, *held* that the compromise was a family arrangement and did not amount to a *transfer* of property—*Basangowda v. Irgowdatti*, 47 Bom. 597 (603), A.I.R. 1923 Bom. 276, 73 I.C. 196.

A *partition* is not a transfer, because it merely effects a change in the mode of enjoyment of property, and is not an act of *conveying* property from one living person to another—*Indoji Jithaji v. Kothapalli*, 10 L.W. 498, 54 I.C. 146 (151); *Pohkar v. Dulari*, 52 All. 716, 1930 A.L.J. 688, 125 I.C. 1, A.I.R. 1930 All. 687 (691). But see contra—*Rasa Goundan v. Arunachela*, 44 M.L.J. 513, A.I.R. 1923 Mad. 577, 72 I.C. 978 (dissenting from 10 L.W. 498); and *Ramaswami v. Kathamuthu*, 24 L.W. 180, 97 I.C. 70, A.I.R. 1926 Journal 167.

A family arrangement or compromise by which the antecedent right of the parties is acknowledged and defined, is not a transfer of property, as it does not convey any new distinct title to either of the parties—*Khunni Lal v. Gobind*, 33 All. 356 (P.C.), 15 C.W.N. 545 (552), 10 I.C. 477; followed in *Hanuman v. Abbas*, 4 Luck. 452, A.I.R. 1929 Oudh 193 (201), 120 I.C. 387; *Ram Gopal v. Tulshi Ram*, 51 All. 79 (F.B.), 116 I.C. 861, A.I.R. 1928 All. 641 (643).

A *relinquishment* by a reversioner of his reversionary interest does not amount to a transfer—*Barati Lal v. Salik Ram*, 38 All. 107. But see

Dhoorjeti v. Dhoorjeti, 30 Mad. 201 (203), where a relinquishment has been held to effect a transfer.

The creation of an easement is not a transfer of property, and is outside the scope of this Act—*Sital Chandra v. Delanney*, 20 C.W.N. 1158 (1163), 34 I.C. 450.

38. Property:—The following are included in the term “Property”:

(a) Actionable claim or chose-in-action—*Rudra Perakash v. Krishna*, 14 Cal. 241 (244); *Muchiram v. Ishan Chunder*, 21 Cal. 568.

(b) Equity of redemption—*Muchiram v. Ishan*, 21 Cal. 568; *Kanti Ram v. Kutubuddin*, 22 Cal. 33; *Mata Din v. Kazim Husain*, 13 All. 432 (474).

(c) Vested remainder—*Umesh v. Zahur*, 18 Cal. 164.

(d) A share in an estate—*Mahomed v. Kashi Nath*, 3 C.W.N. 180.

(e) The power of appointment given to trustees under a settlement—*Joshua v. Alliance Bank*, 22 Cal. 185 (202).

(f) A Hindu Idol is property and may be recovered in a suit, though it cannot be made the subject of unrestricted alienation—*Subbaraya v. Chellappa*, 4 Mad. 315.

(g) A hat is property, so that the rents and profits derivable therefrom may be validly transferred—*Golam Mohiuddin v. Parbati*, 36 Cal. 665.

(h) The right to perform religious services of an idol—*Nagiah Bathudu v. Muthachary*, 11 M.L.J. 215.

(i) The interest of a mortgagee in the property mortgaged to him—*Ram Shankar v. Ganesh*, 29 All. 385 (F.B.), dissenting from *Mata Din v. Kazim Hussain*, 13 All. 432, in which it was held that the term ‘property’ meant the actual physical property and not any interest in such property.

(j) A right to conveyance of land—*Narasingerji v. Panaganti*, 1921 M.W.N. 519, A.I.R. 1921 Mad. 498.

39. “In future”:—A transfer means a conveyance of property not only in present but also in future—*Sumsuddin v. Abdul Husein*, 31 Bom. 165 (172). The conveyance may be in present or in future, but the property itself must be in existence, at least potentially, as the property of the grantor—*Petch v. Tutin*, 15 M. & W. 110; *Sumsuddin v. Abdul*, 31 Bom. 165. “I am not absolutely sure what the words ‘in present or in future’ refer to; I shall have thought that grammatically they refer to property. But there again, I take it that a conveyancer would say that you cannot transfer future property”—*per* Marten, J., in *In re Mahomed Hashan*, 24 Bom.L.R. 861, 75 I.C. 203, A.I.R. 1923 Bom. 107 (113). The words “in present or in future” govern the word ‘conveys’ and not the word “property”. This is indicated by a comma occurring after the word “property”. Therefore, it is clear that there is nothing in this section to indicate that future property can be transferred—*Venkatapathiraja v. Subhadrayamma*, 47 I.C. 563.

40. “Or to himself”:—Under the old law, a person could not convey property to himself though he could create a trust in his own favour—*Bai Mahakore v. Bai Mangla*, 35 Bom. 403 (407); he could only transfer property to himself *conjointly with another*. But the law has now been changed by the addition of the words “or to himself.” “We have amended section 5 to make it clear that a transfer can be made by

a person to himself, as for instance by a person making a settlement or trust in which he constitutes himself a trustee.”—*Report of the Select Committee* (1929).

“Living persons”:—The term “living persons” no doubt includes also juridical persons, such as corporation, and the like, since such persons being the creatures of law are regarded as standing on the same footing as other living beings. Gour’s *Law of Transfer*, 4th Edition, Vol. I, p. 117. This is now expressly provided by the new second para. of this section. Sec. 3 (39) of the General Clauses Act (1897) also defines a “person” as including any company or association or body of individuals whether incorporated or not.

A dedication of property to an idol or a temple is not a transfer (gift) to a “living person” within the meaning of this Act, but is a gift to God; consequently, the requirements of writing and registration do not apply to such a gift—*Ramalinga v. Sivachidambara*, 42 Mad. 440 (443); *Narasimhaswami v. Venkatalingam*, 50 Mad. 687 (F.B.), A.I.R. 1927 Mad. 636, 103 I.C. 302; *Harihar v. Guru Granth Saheb*, 11 P.L.T. 658, 128 I.C. 791, A.I.R. 1930 Pat. 610 (612). An idol may be regarded by a fiction of law as a juristic person, clothed for some purposes with the rights of persons; but a juristic person is not always a “living person”—*Harihar v. Guru Granth*, supra. See Note 630 under sec. 123.

Unborn persons:—Although this Act deals with alienations made as between living persons, still an interest may be created in favour of persons yet unborn, subject to certain restrictions. See sections 13, 14 and 20.

Section 3 of the Hindu Disposition of Property Act (XV of 1916), validates all dispositions made by a Hindu in favour of unborn persons, subject to the limitations contained in Ch. II of the Transfer of Property Act.

6. Property of any kind may be transferred except as
 What may be trans- otherwise provided by this Act, or by any
 ferred. other law for the time being in force.

(a) The chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.

(e) A mere right to sue cannot be transferred.

(f) A public office cannot be transferred nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military, *air force* and civil pensioners of Government and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be a transferee.

(i) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

Amendment:—Clause (dd) has been newly added by sec. 7 of the Transfer of Property Amendment Act (XX of 1929). For reasons, see Note 53. The word “air force” has been added in clause (g) by the Repealing and Amending Act, X of 1927.

40A. Decisions under C. P. Code not to be applied:—Although this section to some extent follows the analogy of the Code of Civil Procedure, section 60, as to property which may be attached, still the decisions under the Code as to attachable property can be of no assistance in this Act. Much which under the law cannot be sold in execution is capable of being dealt with by voluntary transfers, and it would be wholly unsafe to apply to this Act the decisions which have been given with regard to the Civil Procedure Code—*Brahmadeo v. Harjan*, 25 Cal. 778; *Balkrishna v. Paij Singh*, 52 All. 705, A.I.R. 1930 All. 593 (594). While the prohibitions against attachment found in sec. 60 C. P. Code and the prohibitions against attachment found in sec. 6 T. P. Act, have been both enacted on grounds of public policy, the prohibition against attachment so far as it relates to some of the properties mentioned in sec. 60 C. P. Code (such as tools of artisans, necessary cooking vessels, etc.) is not intended to interfere with the right of the owner to effect private alienation of those properties—*Palikandy v. Krishnan Nair*, 40 Mad. 302 (307).

41. Property of any kind is transferable:—A permanent tenancy created before the passing of the Transfer of Property Act, to which if created after the passing of that Act its provisions would be applicable, is transferable—*Madhumati v. Harendra*, 33 I.C. 502 (Cal.).

A non-permanent tenure created after the passing of the Transfer of Property Act and before the Bengal Tenancy Act came into operation is transferable—*Mahanta Bhagaban Das v. Bisweswar*, 44 C.L.J. 434, A.I.R. 1927 Cal. 220, 100 I.C. 302 (distinguishing 7 C.L.J. 553).

A lease from year to year is transferable under this section unless there is anything to the contrary in the contract of lease—*Bandhulal v. Lagin*, 36 I.C. 1006 (Cal.).

When either immovable or moveable property is offered as security, the proprietary interest of the surety is not automatically extinguished,

but merely a first charge is created on the security which will have to be available in the first instance for the purpose for which it has been offered. Although the depositor cannot defeat that purpose, his power of disposal of his security subject to that charge will subsist, and his interest in the surplus which may remain over is both transferable and attachable. Such an interest does not come within any of the exceptions mentioned in this section—*Shanthanand v. Basudevanand*, 52 All. 619 (F.B.), 1930 A.L.J. 402, A.I.R. 1930 All. 225 (242), 125 I.C. 477.

42. Clause (a):—“*Chance of an heir-apparent*”—Cf. Clause (k) of sec. 60, C. P. Code, which enacts that “an expectancy of succession by survivorship or other merely contingent or possible right or interest” is not liable to attachment and sale in execution of a decree.

In England also, the expectancy of an heir apparent is not capable of being made the object of assignment—*per* Lord Eldon in *Carleton v. Leighton*, 3 Mer. 667 (671).

The right of a presumptive reversionary heir under the Hindu Law or the bare chance of surviving another and succeeding to his inheritance is no more than a *spes successionis* (hope of succession) or expectancy and cannot be transferred under clause (a) of this section—*Manikram v. Ramalinga*, 29 Mad. 120; *Venkatanarayana v. Subbammal*, 38 Mad. 406 (410); *Dhoorjeti v. Dhoorjeti*, 30 Mad. 201 (202); *Ghulam Mahomed v. Tekchand*, 2 Lah. 199; *Shamsundar v. Achhan Kumar*, 21 All. 71 (P.C.) (virtually overruling *Brahmadeo v. Harjan*, 25 Cal. 778); *Amrit Narayan v. Gaya Singh*, 45 Cal. 590 (P.C.); *Har Nath v. Inder Bahadur*, 45 All. 179 (183) (P.C.); *Annada Mohan v. Gour Mohan*, 48 Cal. 536; *Nund Kishore v. Kanee Ram*, 29 Cal. 355 (358); *Anandi Bai v. Rajaram*, 22 Bom. 984; *Babu v. Ratnoji*, 21 Bom. 319; *Bai Parvati v. Dayabhai*, 44 Bom. 488; *Dwarka v. Nasir Ahmad*, 11 O.L.J. 219, A.I.R. 1925 Oudh 16; *Bhagwan v. Munnu*, 15 O.C. 122, 13 I.C. 495; *Dio Chand v. Imam Din*, 41 I.C. 347, 135 P.L.R. 1917; *Jagannath v. Dibbo*, 31 All. 53; *Bahadur Singh v. Mohar Singh*, 24 All. 94 (P.C.); *Bhagwati v. Jagdam*, 6 P.L.J. 604, 2 P.L.T. 471, 62 I.C. 933. A transfer by a Hindu of a reversionary interest is void under this clause, and the same cannot be given effect to by applying sec. 43, after the reversioner becomes full owner upon the death of the widow. See Note 202 under sec. 43.

Even a reversioner cannot transfer his interest in *moveable* property (e.g., promissory notes)—*Hargowan v. Baij Nath*, 32 All. 88.

But a reversioner can *relinquish* his reversionary right, for relinquishment is not the same thing as transfer—*Barati Lal v. Salik Ram*, 38 All. 107 (111); See also *Md. Hashmat Ali v. Kaniz Fatima*, 13 A.L.J. 110, 27 I.C. 701; *Basanta Kumar v. Lala Ram Sankar*, 59 Cal. 859, A.I.R. 1932 Cal. 600 (611). But see *Dhoorjeti v. Dhoorjeti*, 30 Mad. 201 (203), where a relinquishment by the reversionary heirs of their right to succeed was held to have the same effect as a transfer, and therefore void. Similarly, a *partition* is not a transfer; and therefore the daughters who had possession of the property during their mother's lifetime could effect a partition of the property—*Pokhar v. Dulari*, 52 All. 716, 1930 A.L.J. 688, A.I.R. 1930 All. 687 (691), 125 I.C. 1. So also, an *acknowledgment* by a reversioner of the widow's absolute right in her husband's property under his will does not amount to a transfer of the reversionary right in favour of the widow—*Chetty v. Chetty*, 31 Mad. 474. An acknowledgment of this nature does not prevent the reversioner from claiming the property as heir when the

succession opens out—*Bahadur v. Mohar Singh*, 24 All. 94 (107, 108) (P.C.). An admission by a reversioner for consideration that the disputed properties never formed part of the estate of the person from whom he claims as a reversioner, does not amount to a transfer of reversionary right—*Kamaraju v. Kocherlakota*, A.I.R. 1925 Mad. 1043, 49 M.L.J. 296, 88 I.C. 982.

A family arrangement in the nature of a partition is not a transfer, even though one of the results of the arrangement is to put one of the parties in the same position as if he had taken a transfer—*Chahlu v. Parmal*, 41 All. 611 (616); *Raghubir v. Narain*, 1930 A.L.J. 1541, A.I.R. 1930 All. 498 (502). Thus out of four separated brothers one H died leaving a widow who remarried one of the surviving brothers P. Afterwards another brother S died, whereupon the two remaining brothers entered into an arrangement by which P was allowed to retain H's share of the property and the fourth brother G was to get the share of S on the death of the latter's widow. Held that the agreement was not void under this clause, as it did not amount to a transfer—*Chahlu v. Parmal*, 41 All. 611 (618). See also *Muthuraman v. Ponnuswamy*, 29 I.C. 549, 29 M.L.J. 214. A provision in a family settlement whereby certain Hindu brothers divided the family property belonging to them among themselves and agreed that upon any of them dying without male issue his share would pass to the surviving brothers, was merely an agreement among the expectant heirs to divide a property in a particular way and did not amount to a transfer, and therefore it was not in contravention of the provisions of the Hindu law or of this section—*Kanti Chandra v. Ali Nabi*, 33 All. 414; *Ram Niranjun v. Prayag Singh*, 8 Cal. 138; *Mangal Singh v. Ghasita*, A.I.R. 1929 Lah. 485 (487), 116 I.C. 312. A consent by the nearest reversionary heir (a female) to a gift of property made by the widow in possession, the donee undertaking to maintain the reversioner, does not amount to a transfer of *spes successionis* by the reversioner. The transaction is in the nature of a family arrangement—*Annu v. Shripati*, 32 Bom.L.R. 705, A.I.R. 1930 Bom. 373 (374), 127 I.C. 332.

The Patna High Court however holds that an agreement (by way of family settlement) entered into between the reversioners during the lifetime of a widow to the effect that on her death her life-estate should revert to a particular reversioner, is null and void, whether it is treated as a family arrangement or relinquishment. But as in this particular case the agreement was entered into in 1868 before the T. P. Act came into force, it was given effect to—*Lalita Prasad v. Sarnam*, 14 P.L.T. 27, A.I.R. 1933 Pat. 165 (172, 173).

Under the Mahomedan Law also, the chance of an heir apparent is nothing more than an expectancy which is neither transferable nor releasable under the Mahomedan Law—*Sumsuddin v. Abdul*, 31 Bom. 165 (171); *Abdul Hossein v. Golam Hossain*, 30 Bom. 304; *Hossain Ali v. Narid*, 11 All. 456; *Muranjani v. Meera Labhai*, 24 M.L.J. 258, 18 I.C. 185; *Rebati Mohun v. Ahmed Khan*, 9 C.L.J. 50, 1 I.C. 590. Even the relinquishment by an heir apparent of his right of inheritance is invalid under the Mahomedan Law—*Asa Beevi v. Karuppan*, 41 Mad. 365 (370); *Sumsuddin v. Abdul*, 31 Bom. 165 (171). But in an Allahabad case where there was an arrangement between the husband and wife whereby the wife accepted in lieu of her dower a life estate in a portion of the property of her husband, and the husband accepted a life estate in other portions

of his property, and it was further stipulated that on the death of the wife the husband would not succeed to her property but that the estate would devolve on their children, *held* that this was in the nature of a family settlement and the relinquishment by the husband of his right to succeed as heir to his wife was valid, as it did not amount to a transfer, and did not fall under clause (a) of this section—*Nasir-ul-Huq v. Faiyazul Rahman*, 33 All. 457 (462).

43. Transfer of vested interests:—Where under a deed of gift the donee was not to take possession of a portion of the gifted property until after the death of the donor and his wife, and the donee transferred a portion of the gifted property after the donor's death but during the life of the donor's widow, *held* that the donee was given a vested interest in the property, subject only to the life-interest of the widow, and that its transfer was not forbidden by law—*Lachman v. Baldeo*, 21 O.C. 312, 48 I.C. 396 (398). A Hindu widow adopted a son, and there was an agreement postponing the son's estate during the life-time of the widow. The adopted son sold away a portion of the property during the widow's life-time. *Held* that the interest created in favour of the son was not a mere possibility of succession to the estate after the death of the widow, but it was a vested right, the right of enjoyment and possession being only postponed, and that the sale was unaffected by the provisions of this clause—*Balwant v. Joti Prasad*, 40 All. 692 (703), 16 A.L.J. 765, 47 I.C. 599. A will provided as follows: "After my death, my widow being in possession as owner of all properties shall administer and enjoy the same, and having repaid all my debts for which she can sell a portion of the properties, she will be competent to adopt. On the death of my widow, my adopted son, if adopted, will get all the properties. During the lifetime of my widow, the adopted son will get an allowance of Rs. 20 a month from my widow." *Held* that though the estate remained vested in the widow till her death and the adoption of a son did not divest her of the estate, the interest of the adopted son was nevertheless a vested interest in the remainder, capable of being transferred under the law, and not a mere *spes successionis*. So, if the adopted son had, for valuable consideration, agreed to forego his right to some of those properties and convey an absolute title therein to the widow of the testator, the deed would be operative—*Basanta Kumar v. Lala Ram Sankar*, 59 Cal. 859, A.I.R. 1932 Cal. 600 (610). If, under a settlement, any interest created is always ready from its commencement to its end to come into possession the moment the prior estates happen to determine, it is then a vested remainder and is recognised as an estate grantable by deed. It would be an estate in possession, were it not that other estates have a prior claim; and their priority alone postpones or may entirely prevent possession being taken by the remainderman. The gift is immediate, but the enjoyment must necessarily depend on the determination of the estates of those who have a prior right to the possession. Such an estate is not a mere *spes successionis* and is transferable—*Ma Yait v. Mahomed Ibrahim*, 5 Rang. 145, 102 I.C. 690, A.I.R. 1927 Rang. 165.

43A. Transfer of contingent interest :—A contingent interest which might afterwards become vested is something very different from a mere *spes successionis* referred to in clause (a) of this section. There is nothing in this clause to prohibit the transfer of a contingent interest—*Phulwanti v. Janeshar*, 46 All. 575 (592), A.I.R. 1924 All. 625, 83 I.C. 782. By a

settlement the settlor transferred his properties to trustees in trust to allow him to manage them and enjoy the whole income during his life time, to hold thereafter the properties specified in the first three schedules during the life of the widow and till attainment by the youngest child of the age of 20, distributing the income between the widow and the children in certain proportions, to sell the properties after the youngest child reaching 20 and distribute the proceeds equally between them. The trustees, further, were to have charge of the properties mentioned in the fourth schedule to be held up to the death of the youngest child and then to be divided among the children then living. One of the sons of the settlor transferred his interest under the settlement while the properties were in the hands of the trustees. *Held* that the settlement created a vested right for the children in the income and a contingent right in the corpus, and the contingent interest taken was neither a possibility of succession nor a chance of legacy nor a mere right to sue. The transfer therefore did not contravene this section and was valid—*Ma Yait v. Official Assignee*, 8 Rang. 8 (P.C.), 34 C.W.N. 173 (176), 32 Bom.L.R. 125, 1930 A.L.J. 119, 58 M.L.J. 83, A.I.R. 1930 P.C. 17, 121 I.C. 225, on appeal from *Ma Yait v. Md. Ibrahim*, 5 Rang. 145, 102 I.C. 690, A.I.R. 1927 Rang. 165.

44. Contract to transfer right of expectancy :—Even a *contract* to transfer a right of expectancy is invalid. Thus, a contract by a Hindu to sell immoveable property to which he is the then nearest reversionary heir, expectant upon the death of a widow in possession, and to transfer it upon possession accruing to him, is void. Section 6 (a) of the Transfer of Property Act, which forbids the transfer of a right of expectancy, would be futile if a contract of the above character were enforceable—*Annada Mohan v. Gour Mohan*, 50 Cal. 929 (936) (P.C.), 28 C.W.N. 713, 74 I.C. 499, A.I.R. 1923 P.C. 189; *Sri Jagannadha v. Sri Rajah Prasada*, 39 Mad. 554 (558, 559), 29 I.C. 241; *Sumsuddin v. Abdul*, 31 Bom. 165 (174); *Basanta Kumar v. Lala Ram Sankar*, 59 Cal. 859, A.I.R. 1932 Cal. 600 (611). Where a person expected that certain karnam lands would be enfranchised in his name, and he agreed to transfer his interest in the property when that event would take place, *held* that this was no more than a transfer of an expectancy and as such offended against cl. (a) of this section. The agreement was void—*Auryaprabhakara v. Gummudu*, 48 M.L.J. 598, A.I.R. 1925 Mad. 885, 88 I.C. 557; and the fact that the vendor was in physical possession of the property and was merely subject to the disability to alienate, did not make any difference—*Ibid*. In this respect the Indian law differs from the law in England. Under the English law, a man can *contract* to assign property which is to come into existence in future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign becomes a complete assignment—*Collyer v. Isaacs*, 19 Ch.D. 342; *Lyde v. Mynn*, 1 My & K. 683; *Holroyd v. Marshall*, 36 L.J.Ch. 193, 10 H.L.C. 191; *Clements v. Mathews*, 11 Q.B.D. 808 (818); *Withered v. Withered*, (1828) 2 Sim. 183. The principle of these decisions was followed in certain earlier cases—*Rajah Sahib Perhlad v. Doorga*, 12 M.I.A. 286; *Bhabo Soondree v. Issur Chunder*, 11 B.L.R. 36; *Mohendra v. Kali*, 30 Cal. 265 (275). The last of these cases was decided without reference to the Transfer of Property Act, and the other two decisions were given before this statute was enacted. The tendency of modern decisions, however, is not to follow the principle of the English cases cited

above. "It seems to me that it is our duty to give effect to what we consider to be the plain provisions of our statute law, instead of following a course of English decisions which would appear to have been based, from the very first, on a regard for long established practice rather than on principle, and which have failed to commend themselves to Lord Eldon"—*per* Wallis, C.J., in *Sri Jagannadha v. Sri Rajah Prasada*, 39 Mad. 554 (558). Before the Transfer of Property Act was extended to the Bombay Presidency, the Bombay High Court held that a contract to sell a reversionary interest was enforceable—*Gitabai v. Balaji*, 17 Bom. 232 (234). This ruling is no longer authoritative.

45. Transfer of expectancy by consent decree or compromise :—The Court does not allow the transfer of a mere right to succession to be effected even by means of a consent decree—*Ramasami v. Ramasami*, 30 Mad. 255 (263). A compromise of a suit, according to the terms of which the mortgagee (to whom the Hindu widow had mortgaged her property) and the reversioner agreed to divide the property in equal shares after the widow's death amounts to a transfer of an expectancy by the reversioner and is therefore invalid under the provisions of this clause—*Bhagwan v. Munnu*, 15 O.C. 122, 13 I.C. 495.

Estoppel :—But although a transfer of an expectancy (in the shape of a compromise) by a reversioner is void, he may, by becoming a party to the compromise and by taking the benefit of the compromise, be *estopped* from subsequently claiming as a reversioner—*Annada Mohan v. Gour Mohan*, 48 Cal. 536 (542); See also *Bhana v. Guman*, 40 All. 384 (386); *Kanhai Lal v. Brij Lal*, 40 All. 487 (496) (P.C.); *Bahadur v. Ram Bahadur*, 45 All. 277 (281); *Raghubir v. Narain*, 1930 A.L.J. 1541, A.I.R. 1930 All. 498 (500), 126 I.C. 24; *Ramgowda v. Bhausahab*, 52 Bom. 1 (P.C.), A.I.R. 1927 P.C. 227. Therefore, where a reversioner enters into a compromise of a doubtful claim to the property to which he has a chance of succession, the compromise is binding on him, and when the succession opens he cannot claim the property in contravention of the compromise—*Moti Shah v. Ghandarp*, 48 All. 637, A.I.R. 1926 All. 715, 96 I.C. 595. A sale by the reversioners of their right of succession during the life time of the widow is void. But if after the death of the widow, when their reversionary rights have become rights of ownership, they enter into a compromise with the purchasers by virtue of which the latter enter into possession of the property, and a decree is passed in terms of the compromise, the vendors cannot afterwards claim the property in contravention of the compromise—*Durga Prasad v. Narain*, 4 Luck. 181, 5 O.W.N. 1081, A.I.R. 1929 Oudh 63, 115 I.C. 294.

46. Chance of Legacy :—Although contracts to make testamentary dispositions are valid, the person in whose favour such a contract exists cannot transfer his supposed right under the contract to a third person, and the latter cannot, on the strength of such a transfer, sue for a declaration of those rights—*Prag Dat v. Chote Singh*, 9 O.C. 55.

47. "Any other mere possibility of a like nature" :—The words "of a like nature" indicate that the *possibility* referred to herein must belong to the same category as the chance of an heir apparent or the chance of a relation obtaining a legacy—*Pashupati Venkatapathi v. Venkata Subhadrayamma*, 47 I.C. 563 (Mad.).

The right to receive the offerings made at a temple cannot be trans-

ferred, because the chance that future worshippers will give offering to a temple is a mere 'possibility' within the meaning of this clause, and as such is inalienable—*Puncha Thakur v. Bindeshri*, 43 Cal. 28, 19 C.W.N. 580, 28 I.C. 675. But the Allahabad High Court dissents from this view and holds that the right to receive offerings when made is a definite and fixed right and does not depend on any possibility of the nature referred to in clause (a). The moment the offerings are made, the person clothed with the right is entitled to appropriate the same. In short, the right to receive the offerings is not so uncertain, variable and limited as to pass out of the conception of law—*Balmukund v. Tula Ram*, 50 All. 394, 26 A.L.J. 185, A.I.R. 1928 All. 721, 113 I.C. 242.

A vendor's right to receive the purchase-money, before the sale is completed, is merely a possible right or interest, which cannot be attached or sold—*Ahmaduddin v. Majlis*, 3 All. 12 (14). The future wages or salary of a servant before it is earned is a mere expectancy and not property so as to be capable of being attached or assigned—*Debi Prasad v. Lewis*, 6 A.L.J. 227.

The right of a Mahabrahman to officiate as priest in funeral ceremonies of Hindus is not a 'mere possibility' and is capable of transfer—*Sukh Lal v. Bishambar*, 39 All. 196, 37 I.C. 661. See also *Raghoo v. Kassy*, 10 Cal. 73.

48. Clause (b)—Right of re-entry:—A right of re-entry always presupposes an estate in the person asserting that right. Therefore, a lessor reserving a right of re-entry on breach of a covenant by his lessee cannot transfer that right by itself—*Smith v. Pankhurst*, 3 Atk. 139. But where the subject matter of the transfer was not the right of re-entry by itself but also the reversion as based on a clause of forfeiture in the lease for non-payment of rent, such transfer was held not to be invalid by reason of this clause—*Vaguran v. Rangayyanagar*, 15 Mad. 125. What this clause prohibits is a transfer of a *right of re-entry on a breach of a condition* subsequent. Such a right of re-entry is different from a right of re-entry on the expiry of the term of the lease. The latter right is in the nature of a reversion, which can be validly transferred to any person. But a right of re-entry on breach of a condition subsequent cannot be transferred without the reversion, for if it could be so transferred, the transferee could only use it for the purpose of a suit to enforce forfeiture without gaining any right or interest in the property so demised, and the transfer would have been a transfer of a mere right to sue. If, however, the lessor transfers not merely a right of re-entry on breach of a condition, but the whole of his interest in the land, the transfer is perfectly valid. Thus, where a lease provided that the lessee was not to alienate the property leased, and the lessee committed a breach of the condition by sale of his rights under the lease, but the lessor did not give to the lessee any notice of his intention to enforce the forfeiture, and then he sold his landlord's rights to the plaintiff, *held* that the transfer was valid, as the right which was transferred was not a right of re-entry because the lessor had not given any notice to the lessee of his intention to re-enter, but the whole of the landlord's interest, and the transferee (plaintiff) was entitled to enforce the forfeiture against the lessee—*Vishveshwar v. Mahableshwar*, 43 Bom. 28 (33, 35) 20 Bom.L.R. 767, 47 I.C. 330.

49. Clause (c)—Easement:—In section 4 of the Indian Easements Act (V of 1882), 'easement' has been defined as "a right which the owner

or occupier of a certain land possesses as such for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in, or upon, or in respect of, certain other land, not his own."

In the Limitation Act (sec. 26), the definition is much more comprehensive and includes what in English law is called a *profit a prendre*, i.e., a right to enjoy a profit out of the land of another.

An easement cannot be transferred apart from the dominant heritage. It is a right ancillary to the enjoyment of the land and cannot be disannexed from it—*Hill v. Tupper*, 32 L.J. Exch. 217. "There can be no easement properly so called, unless there be both a servient and a dominant tenement. There can be no such thing according to our law, or according to the civil law, as what I may term an 'easement in gross.' An easement must be connected with a dominant tenement."—*Per* Lord Cairns, L.J., in *Rangeley v. Midland Railway Co.*, L.R. 3 Ch. 310.

An easement which can be transferred apart from the dominant heritage would be an easement in gross which is not recognised in India—*Municipal Board v. Lallu*, 20 All. 200. This clause lays down that there cannot be an easement in gross—*Sital Chandra v. Delanney*, 20 C.W.N. 1158 (1163), 34 I.C. 450. Even where certain customary easements in gross are recognised, they are not transferable. Thus, the right of certain villagers to hold village fairs in another's land is not alienable—*Ashraff v. Jagannath*, 6 All. 497; so also, a right to hold markets or horseraces in another's land—*Mounsey v. Ismay*, 34 L.J. Exch. 52; similarly, a right to bathe in another's tank (*Channanam v. Manu*, 1 M.L.J. 47) or to place taziah in another's land during the celebration of the Moharam festival (*Mamman v. Kuar Sen*, 16 All. 178) cannot be transferred.

But an easement can be *released* by the dominant owner in favour of the owner of the servient tenement. In such a case the easement is not transferred but extinguished—*Kristodhone v. Nandarani*, 35 Cal. 889, 12 C.W.N. 969.

50. Clause (d) :—Interest in property restricted to personal enjoyment :—This clause contemplates cases like service-tenures or the office of an *archaka* in a temple, which is restricted in its enjoyment and cannot be transferred by the office-holder—*Seshappa v. Chandayya*, 37 M.L.J. 402, 53 I.C. 665 (667). An interest restricted to personal enjoyment cannot be transferred, because if its transfer were allowed, it might defeat the object underlying the restriction, and it would be manifestly inconsistent with the presumed intention of its founder—*Juggurnath v. Kishen*, 7 W.R. 266; *Kalicharan v. Mohan*, 6 B.L.R. 727; *Rajah Varma v. Ravi Varma*, 1 Mad. 235 (P.C.). Thus, a grant for the grantee's parwarish for lifetime is a grant of an interest restricted in its enjoyment to the grantee personally and is not a creation of a life estate; the transfer of such a grant is invalid under clause (d) of this section—*Md. Shabbar v. Harnath*, 4 O.W.N. 857, 105 I.C. 196, A.I.R. 1927 Oudh 436. So also, religious offices, rights of maintenance, service tenures, etc., cannot be transferred. See below.

A grove-holder may not be the owner of the land, but his interest as a grove-holder including ownership of the trees and the right of enjoyment thereof is not "restricted in its enjoyment to the owner (original grove-holder) personally" within the meaning of this clause, nor is there anything in the nature of the tenure of a grove-holder

which makes the transfer of such interest opposed to such interest, so as to make clause (h) applicable. Therefore, a successor of the original grove-holder can transfer the grove, unless there is a local custom or a condition subject to which the grant was made, which disentitles the grove-holder to transfer his grove—*Sheo Mangal v. Jagan*, 123 I.C. 767, A.I.R. 1930 All. 377 (378).

51. Religious office :—A priestly office with emoluments attached to it is inalienable. It would be contrary to public policy to allow priestly offices to be transferred either by private sale or by sale in execution of a decree—*Mallika v. Ratanmani*, 1 C.W.N. 493. Thus, the right of a shebait of a Hindu idol to perform the services and receive the customary remuneration is not transferable. “Such a sale would practically destroy the endowment or have the effect of defeating the whole object of its creation. There would be no guarantee that the service would be properly kept up, for the purchaser, whoever he might be, even if a Mahomedan or Christian, would have the right of performing the worship of a Hindu idol”—*per Macpherson, J.*, in *Juggurnath v. Kishen*, 7 W.R. 266; *Drobo v. Srineebash*, 14 W.R. 409. The office of a *Mutwalli* or *Sajjadanashin*, is a personal trust, and the office may not be transferred nor the endowed property conveyed to any person whom the acting mutwalli may select—*Wahid Ali v. Ashraff*, 8 Cal. 732; *Sarkum v. Rahaman*, 24 Cal. 83; *Haji Ali Mahomed v. Anjuman-Islamia*, 12 Lah. 590, A.I.R. 1931 Lah. 379 (382). The right of a *purohit* to perform religious ceremonies at a particular place or temple cannot be the subject of transfer—*Rajaram v. Ganesh*, 23 Bom. 131; *Raja Varma v. Ravi Varma*, 1 Mad. 235; *Ganasambandha v. Velu*, 23 Mad. 271. The hereditary right of a village joshi to perform religious ceremonies at his jajman's house is not transferable—*Waman v. Balaji*, 14 Bom. 167. A right to receive voluntary offerings made at the worship by votaries resorting to a temple or shrine is not transferable—*Dinonath v. Pratap*, 27 Cal. 30; *Rameshwar v. Ishan*, 10 W.R. 457; *Shailaja v. Peary*, 29 Cal. 470; *Puncha Thakur v. Bindeswari*, 43 Cal. 28, 19 C.W.N. 580; *Nityagopal v. Provash*, 47 Cal. 990, 31 C.L.J. 37; *Paragi v. Gouri*, 6 O.L.J. 157, 51 I.C. 86; *Kashi v. Kailash*, 26 Cal. 356. But a sale of the *Jajmani bahis* (i.e., books in which lists are kept of pilgrims who visited the place in past years) is not forbidden by this clause because the sale is only a sale of the books as such and does not confer on the purchaser the right to act as the hereditary guide of the pilgrims—*Gopi Nath v. Jhandu*, 4 A.L.J. 712.

A distinction must be drawn between cases in which emoluments are attached to a priestly office, and cases in which the offerings are made to a Deity and the persons who receive the same have not to render services of a personal nature as a consideration for the receipt of the offerings. The emoluments of the former kind are not ordinarily transferable, because they are inseparably connected with a priestly office which is non-transferable. But when the right to receive the offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the worship, the right is a valuable right and is property, and therefore transferable—*Balmukund v. Tula Ram*, 50 All. 394, A.I.R. 1928 All. 721, 113 I.C. 242.

Although ordinarily religious offices cannot be the subject of sale, it does not always follow that every religious office is *extra commercium*. By the custom of a particular institution such alienation might be valid—

Rangasami v. Ranga, 16 Mad. 146. Thus, where it is found that *mirasi* offices in a temple had been the subject of frequent alienations and the temple authorities recognised their validity, the alienation of such offices can be upheld—*Ibid.* To hold the poles of the god's seat when taken in procession is a religious office alienable by custom of the institution—*Ibid.* The alienation of the priestly office to a person belonging to the founder's family and standing in the line of succession to him is sometimes allowed—*Sitarambhat v. Sitaram*, 6 B.H.C.R. 250; *Mancharam v. Pransankar*, 6 Bom. 298. The Madras High Court has held that a sale of a religious office to a person not in the line of heirs of the founder is illegal—*Kuppa v. Dorasami*, 6 Mad. 76. In a later case the Bombay High Court has considered all the rulings and come to the conclusion that where the members of a family are entitled to a religious office (right to perform worship in a temple), one member of the family can transfer or surrender his share of the office and emoluments only in favour of the remaining members of the family, but not in favour of an outsider or even in favour of the original grantor or his heirs—*Raghunath v. Purnanand*, 47 Bom. 529 (533), A.I.R. 1923 Bom. 358, 72 I.C. 312.

A *pala* or turn of worship is transferable—*Mohamaya v. Haridas*, 42 Cal. 455. But such transfer can be made within a limited class. Thus, where by custom a right to perform puja by turns is conferred on Brahmins only, the transfer of such a right to a non-Brahmin is not valid—*Jagdeo v. Ram Saran*, A.I.R. 1927 Pat. 7, 97 I.C. 332.

52. Right of pre-emption:—According to Mahomedan law, the object and basis of the pre-emptive right is to prevent the introduction of strangers as co-sharers in the property; and the right is enforced on the hypothesis that the introduction of a stranger causes inconvenience to pre-emptive co-sharers. The right is essentially based upon the injury which such inconvenience is supposed to cause. Being a personal privilege of the pre-emptor, it cannot be made the subject of sale or bargain of any kind—*Rajjo v. Lalman*, 5 All. 180 (183). But where a person has obtained a conditional decree for pre-emption, he can mortgage his rights under the decree to a stranger, in order to raise funds to pay the purchase-money, and he does not by such transaction forfeit his right under the decree—*Bela Bibi v. Akbar Ali*, 24 All. 119 (125, 126).

53. Clause (dd)—Right to receive maintenance:—A right to receive maintenance, which originally fell under clause (d) of this section (interest in property restricted to personal enjoyment) has now been specially provided for by the new clause (dd), and has been declared to be inalienable.

The right of maintenance which a Hindu widow has out of lands which belonged to her husband and have devolved on her son, is a purely personal right and cannot be transferred—*Bhyrub v. Nubo Chunder*, 5 W.R. 111. The husband's duty of maintaining his wife is one which he cannot owe to another. Her right as against him is one that she cannot transfer to another—*Narbadabai v. Mahadeo*, 5 Bom. 99. A right to receive future maintenance can neither be attached in execution of a decree nor transferred under clause (d) or (h)—*Palikandy v. Krishnan Nair*, 40 Mad. 302 (307). A right to receive maintenance being a right restricted in its enjoyment to the owner personally, is inalienable, and it is immaterial whether a charge has been created for the same—*Altaf Begam v. Brij Narain*, 51 All. 612, 1929 A.I.J. 367, 116 I.C. 855, A.I.R. 1929 All. 281;

Tara Sundari v. Saroda, 12 C.L.J. 146 (153), 7 I.C. 80. Where a widow who had succeeded as heir to the property of her husband by a registered deed surrendered her life-interest in the property to the nearest reversioner, who in return agreed to maintain her, *held* that the right to maintenance thus conferred on the widow was purely 'personal' to her within clause (d) and was not transferable—*Subraya v. Krishna*, 46 Mad. 659 (F.B.), A.I.R. 1924 Mad. 22, 73 I.C. 584. In England also it has been held that alimony granted to a separated wife is not alienable by her—*Watkins v. Watkins*, [1896] Prob. 222. But where in discharge of the obligation a maintenance-grant is made to the widow, there can be no prohibition against the transfer of the grant; and if in the grant there is any stipulation restraining alienation, such stipulation is void under section 10—*Singai v. Baji Rao*, 14 C.P.L.R. 114; *Ram Chandra v. Gopinath*, 29 I.C. 251 (Cal.). Property granted in lieu of a right to maintenance may be transferred, for the period of the limited interest, in the absence of any restriction of alienation in the deed of grant—*Balkrishna v. Paij Singh*, 52 All. 705, 125 I.C. 468, A.I.R. 1930 All. 593 (594); *Dhup Nath v. Ram Charitra*, 54 All. 366, A.I.R. 1932 All. 662 (663).

It was held prior to the insertion of this clause, that an annuity by way of maintenance charged upon the estate was alienable whether by voluntary or involuntary transfer—*Murlidhar v. Mulchand*, 52 I.C. 953 (Nag.); *Rajat Kamini v. Satyaniranjan*, 23 C.W.N. 824, 53 I.C. 587. So also, where the claim of maintenance was based on an agreement or merged in a decree, the right under the decree was held to be assignable—*Asad Ali v. Haider Ali*, 38 Cal. 13; *Raja of Kalahasti v. Venkatappa*, 27 L.W. 544, 119 I.C. 872, A.I.R. 1928 Mad. 713; *Seshappa v. Chandayya*, 37 M.L.J. 402, 53 I.C. 665 (667); *Annapurni v. Swaminatha*, 34 Mad. 7 (9), 6 I.C. 439. But these cases are no longer good law in view of clause (dd) which expressly prohibits the alienation of a right to maintenance, in *whatsoever manner arising, secured or determined*. The *Special Committee* (1927) observe:—

"Section 6, which enumerates property of different kinds which cannot be transferred, includes in clause (d) an interest in property restricted in its enjoyment to the owner personally. A right to receive maintenance is a personal right, although any particular property or the income thereof may be charged with it. It is in accordance with public policy that these rights which are generally created for the maintenance or personal enjoyment of a qualified owner, *e.g.*, a Hindu female, ought to be inalienable; but in some cases it has been held that if the amount of maintenance is fixed by an agreement or by decree, it can be assigned. (I.L.R. 5 Bom. 99; 38 Cal. 13). Although an agreement or a decree would make such right definite, it is nevertheless a right created for the personal benefit of the qualified owner and should not be alienable. Section 60 of the Civil Procedure Code which protects such right from the process of a civil court does not make any exception in the case of maintenance fixed by agreement or decree. The above reasoning, however, does not apply to arrears of maintenance which have accrued due. To make the position clear, we have inserted a new clause (dd)."

Where a settlor creates a trust of his property, but reserves some interest in the property as allowance to himself, such allowance does not fall under clause (d) or (dd) and is alienable—*Rajamier v. Subramanian*, 52 Mad. 465, A.I.R. 1928 Mad. 1201, 116 I.C. 827.

Babuana land or property granted by the Maharaja of Durbhanga to junior members of the Raj family to be enjoyed by them in lieu of money maintenance is alienable by custom, subject to the proprietary right of the grantor and to his ultimate claim as reversioner, on extinction of the grantee's descendants in the male line—*Rameshwar v. Jibendar*, 32 Cal. 683; *Ramachandra v. Mudeshwar*, 33 Cal. 1158 (1161).

Arrears of maintenance:—Arrears of maintenance which have accrued due can be assigned—*Seshappa v. Chandayya*, 37 M.L.J. 402, 53 I.C. 665 (667). See the Report of the Special Committee cited above.

Right of residence:—The right of residence is intimately connected with the right of maintenance and follows the same rule. It is neither capable of voluntary transfer, nor can it be attached and sold in execution of a money decree—*Nanak Chand v. Kishen Chand*, 1 P.L.R. page 209.

54. Service tenures:—Ghatwali tenures were created by the Mahomedan Government in order to provide both a police and a military force to watch and guard the land against the invasions of lawless hill-men and others. It thus became a necessary incident of such tenures that they should be incapable of alienation, so that their profits might remain unimpaired for each succeeding ghatwal and thus enable him to render the full and efficient service expected of him—*Narain v. Badi Roy*, 29 Cal. 227 (229). Lands held in Bengal on *ghatwali* tenure are indivisible and inalienable by the holder during his life—*Nilmani v. Bakranath*, 9 Cal. 187 (P.C.). On this principle, the attachment of the future rents and profits that may become due to a ghatwal, in execution of a decree against him, is prohibited, because if the ghatwal is prevented from recovering his future income he would not be in a position to pay the wages of chowkidars and to perform the duty which devolves upon him as ghatwal—*Udoy Kumari v. Hari Ram*, 28 Cal. 483 (485).

Inam lands granted to a person on condition that he will perform *swastivachakam* service in a temple and that he and his family should enjoy the inam so long as they perform the service, are not transferable; because if the inamdar is allowed to transfer the inam, he would be without any means to support himself and to perform the services of the temple—*Anjaneyulu v. Sri Venugopala*, 45 Mad. 620, A.I.R. 1922 Mad. 197, 70 I.C. 466, 42 M.L.J. 477.

56. Clause (e):—**Mere right to sue**:—Cf. clause (e) of section 60, C. P. Code, under which a mere right to sue for damages is not attachable.

A right to sue is not transferable. Consequently the sale of a right to sue for immoveable property does not confer on the vendee any title to immoveable property, and the vendee cannot sue for possession—*Nazir Hassan v. Mutinuzzaman*, 11 O.L.J. 672, A.I.R. 1925 Oudh 299 (300). But the transfer of a *property* which is the subject-matter of a litigation is not a transfer of a mere right to sue, although the transfer necessarily carries with it the right to sue—*Khudiram v. Shomnath*, 37 C.W.N. 706 (708), A.I.R. 1933 Cal. 454.

A mere right to sue for damages for injury caused by a wrongful act, such as a wrongful attachment of moveable property in execution of a decree, is not transferable—*Pragi Lall v. Fateh Chand*, 5 All. 207.

A right to recover *mesne profits* is a mere right to sue and is not transferable—*Durga v. Kailash*, 2 C.W.N. 43; *Seetamma v. Venkata-*

ramanayya, 38 Mad. 308; *Jai Narayan v. Kishun Dutta*, 3 Pat. 575 (580), 5 P.L.T. 581, A.I.R. 1924 Pat. 551, 78 I.C. 705.

But where the *property itself* is sold together with the mesne profits, the case does not fall under this clause, and the transfer is valid. In such a case, what is assigned is not a mere right to sue but a property with an incidental remedy for its recovery and consequential benefit. An assignment of a mere right to sue does not convey any property, *e.g.*, if a person out of possession of immovable property makes an assignment to the effect that the assignee would have a right to sue, without conveying any interest in the property, the assignee would not be entitled to maintain any suit for the recovery of the property. But it would be otherwise if the *property itself* is transferred—*Monmatha v. Matilal*, 33 C.W.N. 614 (617), A.I.R. 1929 Cal. 719; *Ganga Din v. Piyare*, A.I.R. 1929 All. 63, 113 I.C. 767; *Shankarappa v. Khatumbi*, 56 Bom. 403, A.I.R. 1932 Bom. 478; *Susai v. Ramaswami*, 38 L.W. 408, 145 I.C. 228, A.I.R. 1933 Mad. 710. “Where the right of action was not a bare right but was incident or subsidiary to a right in property, an assignment of the right of action was permissible, and did not savour of champerty or maintenance”—*per* Scrutton L. J. in *Ellis v. Torrington*, [1920] 1 K.B. 399 (411). This distinction, however, was not noticed in *Scetamma v. Venkataramanayya*, 38 Mad. 308, which was a suit for recovery of *property as well as* mesne profits.

Similarly, where the plaintiff purchased a tank and along with it a covenant against misfeasance, *held* that what was purchased was not a mere right to sue but a property with an incidental remedy for its recovery—*Jagannath v. Kalidas*, 8 Pat. 776, 10 P.L.T. 191, A.I.R. 1929 Pat. 245 (247), 120 I.C. 626.

The right to recover an *ascertained* and *definite* debt is not a mere right to sue and is transferable. It is an actionable claim. The principle is, that if a *certain* sum of money is due from any person, that sum is recoverable on assignment; the right to recover the money is not a mere right to sue and the transfer of such a right does not offend against section 6 (*e*) of the T. P. Act. But if that sum is to be ascertained only on taking accounts it might be that the right to take the accounts is not assignable—*Ramaseshiah v. Ramiah*, A.I.R. 1926 Mad. 417, 50 M.L.J. 54, 92 I.C. 973.

The words “right to sue” not only refer to rights to damages arising out of *torts*, but also include rights arising out of *contracts*. Thus, a right to sue the *gomasta* (agent) for accounts (which is a right *ex contractu*) falls under this clause and is unassignable—*Kshetra Mohan v. Biswa Nath*, 51 Cal. 972 (977), 28 C.W.N. 894, A.I.R. 1924 Cal. 1047, 82 I.C. 411; *Kalusa v. Madhorao*, 9 N.L.J. 59, A.I.R. 1926 Nag. 357, 96 I.C. 339. (Contra—*Churamoni v. Rajendra*, 42 I.C. 390). The right of a person to recover damages (whether liquidated or unliquidated) for the breach of a contract is a right to sue within the meaning of this section and is not capable of being transferred—*Janglimal v. Pioneer Flour Mills*, 106 P.R. 1914, 27 I.C. 115; *Abu Muhammad v. S. C. Chunder*, 36 Cal. 345; *Jewan Ram v. Ratan Chand*, 26 C.W.N. 285, A.I.R. 1921 Cal. 795, 70 I.C. 498; *Hira Chand v. Nem Chand*, 47 Bom. 719, A.I.R. 1923 Bom. 403; *Yadavendra v. Srinivasa*, 47 Mad. 698 (700), A.I.R. 1925 Mad. 62; *Gopala v. Ramaswami*, 21 M.L.J. 153, 6 I.C. 290; and 22 M.L.J. 207, 10 I.C. 320; *Moti Lal v. Radhey Lal*, 1933 A.L.J. 1009, A.I.R. 1933 All. 642 (646, 647); *Shahrugh v. Sheo Prasad*, 41 I.C. 435, 4 O.L.J. 425; *Nakhela v. Kokaya*, A.I.R. 1923

Nag. 67 (68), 69 I.C. 238; *Gerimal v. Raghunath*, A.I.R. 1921 Sind 59, 66 I.C. 873, 16 S.L.R. 71. Thus, the right of the mortgagor to sue the mortgagee for the balance of the consideration which has not been paid by the mortgagee is a right to obtain damages for breach of the agreement to lend money, and is a right to sue within the meaning of this clause; such a right cannot be assigned and the transferee of the right cannot sue the mortgagee for the money—*Yadavendra v. Srinivasa*, 47 Mad. 698, A.I.R. 1925 Mad. 62, 80 I.C. 5. But where A, after mortgaging his property to B, subsequently sells it to C, who retains part of the purchase money for payment of B's mortgage but does not pay it, A has a charge on the property until the amount is paid, and his right to recover the unpaid purchase money from C is not a mere right to sue, but is assignable at law—*Nathu Mali v. Bansaji*, 27 N.L.R. 288, A.I.R. 1931 Nag. 89 (90). A right to sue for the remainder of the maintenance allowance that may fall due in future cannot be transferred—*Altaf Begam v. Brij Narain*, 51 All 612, 27 A.L.J. 367, A.I.R. 1929 All. 281 (285), 116 I.C. 855. A right to recover damages from the purchaser for breach of contract to purchase goods is not an actionable claim but a right to sue, and cannot be transferred—*Hira Chand v. Nem Chand*, 47 Bom. 719 (720), 73 I.C. 465, A.I.R. 1923 Bom. 403. A claim to recover damages from an agent for negligence in collecting rents (whether the claim is viewed as one for compensation for breach of contract or as one founded on tort) is a mere right to sue and cannot be transferred—*Varahaswami v. Rama Chandra*, 38 Mad. 138. A claim to damages for use and occupation from a tenant continuing on the land after the expiration of the lease without the landlord's consent, is a mere right to sue for damages and is not transferable—*Govindaswami v. Ramaswami*, 30 M.L.J. 492, 34 I.C. 6 (reversing on appeal *Govindaswami v. Ramaswami*, 2 L.W. 1186, 31 I.C. 604, 18 M.L.T. 483). Where a person sues not for recovery of the actual crops but for compensation for wrongful appropriation of the crops by the defendant in violation of an agreement, the suit is professedly one for damages resulting from breach of contract. Such a right of action is purely personal and incapable of assignment or attachment—*Liladhar v. Nago*, 28 N.L.R. 340, A.I.R. 1933 Nag. 6 (9), 141 I.C. 479. A contract of service, being a personal contract, is not assignable before breach, as the transfer would be of a mere right to sue—*Karam Khan v. Dangushti*, 47 I.C. 902 (Nag.).

Sales by an Official Assignee of lands in possession of alienees from an insolvent as being part of the insolvent's estate are in substance, if not in form, nothing more than sales of the right to litigate, and assuming that they do not come within the prohibition in the Transfer of Property Act against the transfer of a mere right to sue, they are open to the same objection and are strongly to be deprecated—*Chockalingam v. Secthai Ache*, 6 Rang. 29 (P.C.), 32 C.W.N. 281 (284), 54 M.L.J. 88, 107 I.C. 237, A.I.R. 1927 P.C. 252.

A right to recover money fraudulently omitted to be accounted for in a partition is not a mere right to sue but is an interest in property and therefore an actionable claim, and a transfer of it is not contrary to the provisions of this clause. Neither a mere uncertainty as to the amount to be recovered, nor the fact that it may be necessary to look into the accounts settled makes the right a mere right to sue—*Ramiah v. Rukmani*, 24 M.L.J. 313, 18 I.C. 138. A right to recover past profits of a partner-

ship on taking accounts is not a mere right to sue but is an actionable claim, and is transferable—*Shrinath v. Kanhaiyalal*, A.I.R. 1924 Nag. 145, 75 I.C. 817. A right to reconveyance of land is property and not a mere right to sue, and can be attached and sold in execution—*Narasingerji v. Panaganti*, 1921 M.W.N. 519, A.I.R. 1921 Mad. 498. A right to contribution is not a mere right to sue for damages and is assignable—*Ramaśwami v. Deivasigamani*, 43 M.I.J. 129, A.I.R. 1922 Mad. 397, 69 I.C. 957. Where the vendee in a contract of sale of land transfers his rights under the contract, the transfer is not of a mere right to sue, although a right to sue is involved in it on breach of its conditions. The transfer is therefore not invalid under this clause—*Akhtar Beg v. Haq Newaz*, 78 I.C. 87, A.I.R. 1924 Lah. 709 (711); *Venkateswara v. Raman*, 3 L.W. 435 (439), 33 I.C. 696. An executory contract for the conveyance of land is not a mere right to sue and is transferable. A right to sue is no doubt involved in it, on breach of its stipulations, but before breach there is also the right to get a conveyance. The term 'mere right to sue' is only applicable to cases where there has been a complete breach sounding in damages, and where the specific performance of the contract cannot be obtained—*Venkateswara v. Raman*, 3 L.W. 435, 33 I.C. 696. Where the mortgagor left with the mortgagee a portion of the consideration money, with the understanding that the same should be paid to him whenever he so required, and subsequently the mortgagor assigned his rights regarding the same, *held* that what was transferred was a mere right to sue which is non-transferable under this clause—*Indar v. Raghubir*, 7 O.W.N. 12, A.I.R. 1930 Oudh 88. A transfer of the share of the profits of a village which have at the time actually accrued due, is an assignment of a debt and not of a right to sue, and is therefore not bad in law, although the transfer of a right to sue is a necessary incident of the transaction—*Bharat Singh v. Bindu*, 6 O.L.J. 398, 47 I.C. 634; *Girdhari v. Ahmad Mirza Beg*, 23 O.C. 384, 60 I.C. 690 (691). The transfer of a share in a partnership is not a transfer of a mere right to sue and is valid—*Vishindas v. Thawerdas*, A.I.R. 1925 Sind 18, 17 S.L.R. 334, 80 I.C. 642. A mortgagor leased the mortgaged properties and the lessee agreed to pay the Government dues or be responsible to the lessor in damages. The lessee defaulted and the mortgagee who purchased the properties in auction-sale under a previous mortgagee's decree paid the dues. The mortgagor had also assigned his rights against the lessee to the mortgagee-purchaser. In a suit by the mortgagee against the lessee for the amount of the dues paid, it was pleaded that the assignment was invalid under this clause. *Held* that this clause had no application to the facts of the case. What was assigned was not a mere right to sue but a claim for a definite sum of money which the lessee was bound by his contract with the lessor to repay him. This would be an actionable claim, which is transferable. The failure of the lessee to fulfil this obligation did not give rise to a claim for damages but to a claim for re-imbursement of the precise sum which the landlord had disbursed to meet the obligation; and this claim was properly assigned—*Manmatha v. Sheikh Hedait*, 11 Pat. 266 (P.C.), 36 C.W.N. 280 (284), 62 M.I.J. 287, 135 I.C. 635, A.I.R. 1932 P.C. 32.

A present right under a settlement to enjoy the income of the property divided among heirs is more than a mere right to sue and can be transferred by the beneficiary; and the mere fact that the actual amount due

could not be determined without further inquiry is not fatal to the beneficiary's power of transfer—*Ma Yait v. Mahomed Ebrahim*, 5 Rang. 145, 102 I.C. 690, A.I.R. 1927 Rang. 165.

Where the right to sue has merged in a *decree*, the right under the decree is assignable. Thus, where a claim for *mesne profits* has merged in a judgment before assignment, the right under the judgment can be transferred, although the original cause of action was not transferable—*Prasanna v. Ashutosh*, 18 C.W.N. 450, 20 I.C. 685; *Venkatarama v. Ramaswami*, 44 Mad. 539 (543); *Hari Prasad v. Kodo Marya*, 1 P.L.J. 427, 37 I.C. 998.

57. Clause (f):—Public office:—If the office be not a *public* one in the strict sense it would be transferable, even though the discharge of its duties should be indirectly beneficial to the public—*In re Mirams*, (1891) 1 Q.B.D. 594.

The following public offices have been held to be non-transferable:—

(a) Office of *archaka* in a temple—*Venkatrayar v. Srinivasa*, 7 M.H.C.R. 32.

(b) Office of *paricharaka* in a temple—*Narasimma v. Anantha*, 4 Mad. 391.

(c) *Karaima* right in a temple—*Keyaka v. Yaddatil*, 3 M.H.C.R. 380

(d) *Miras* Office in a temple—*Ramaswami v. Ranga*, 16 Mad. 146.

(e) *Dharmakartaship* in a temple—*Subbarayudu v. Kotayya*, 15 Mad. 389.

(f) Office of *Mutazwalli*, *Sajjadanashin*, *Mahant*, or *Shebait*—*Wahid v. Ashruff*, 8 Cal. 732; *Sarkum v. Rahaman*, 24 Cal. 83; *Girijanand v. Sailajanand*, 23 Cal. 645; *Gobinda Kumar v. Debendra*, 12 C.W.N. 98; *Munshi Shahed Baksh v. Golam Nabi*, 22 C.W.N. 996. See also Note 51.

(g) Office of *Ghatwal*—*Narain v. Badi Roy*, 29 Cal. 227.

(h) Office of *Karnam*—*Kumarasami Pillai v. Orr*, 20 Mad. 145.

(i) Office of *Chowkidar*—*Ram Kumar v. Ram Newaj*, 31 Cal. 1021.

58. Salary of public officer:—The salary of a public officer is not transferable under this Act, although under section 60 clause (i) of the C. P. Code it is attachable under certain restrictions.

Where the law assigns fees to an office, it is for the purpose of upholding the dignity and performing properly the duties of that office, and the policy of the law will not allow the officer to bargain away those fees to the appointer or to any one else—*Corporation of Liverpool v. Wright* 28 L.J.N.S. Ch. 868.

For definition of "Public Officer" see C. P. Code, Sec. 2 (17).

Salary:—The word 'salary' means the recompense or consideration stipulated to be paid to a person periodically for services.

The percentage allowance which a khot receives for collecting the assessments is not his salary—*Ravji v. Sayajirav*, 13 Bom. 673.

Travelling allowances paid to public officers in excess of their fixed stipends are not salaries. Cf. clauses (h) and (i) of sec. 60, C. P. Code.

59. Clause (g):—Pensions:—Clause (g) follows section 12 of the Pensions Act (Act XXIII of 1871) under which "all assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension, pay or allowance....in respect of any money not payable at or before the making thereof, on account of any such pension, pay or

allowance, or for giving or assigning any future interest therein, are null and void."

The word "pension" has been nowhere defined in the Pensions Act. But the Bombay High Court has laid down that "pension" means a periodical allowance or stipend granted not in respect of a right, privilege, perquisite or office, but on account of past services or particular merits, or as compensation to dethroned princes, their families and dependants—*Secretary of State v. Khemchand*, 4 Bom. 432 (436).

A pension is a periodical payment of money by Government to the pensioner—*Lachmi Narain v. Makund*, 26 All. 617; *Wasif Ali Mirza v. Kernani Industrial Bank*, 35 C.W.N. 791 (794) (P.C.). The rents of the properties granted by the Government to the Nawab of Murshidabad are not included in the term "pension," because the Nawab draws the rents not as a pensioner, but as the owner (though a limited owner) of the properties—*Wasif Ali Mirza*, supra. A land granted once for all in lieu of pension is not a pension, and a transfer of such land is not prohibited—*Balwant v. Secretary of State*, 29 Bom. 480; *Ganpat Rao v. Ananda Rao*, 28 All. 104 and 32 All. 148 (P.C.); *Anna Bibi v. Najm-un-nissa*, 31 All. 382; *Kumar Tirumalai v. Bangaru*, 21 Mad. 310; *Subbarayya Mudali v. Velayuda*, 30 Mad. 153. But see *Atma Ram v. Kehar*, 31 P.L.R. 812, A.I.R. 1930 Lah. 904 (905) where it is said that a pension may take the form of an assignment of land revenue.

A Zemindari, burdened with the payment of land revenue, granted as a reward for past services rendered to Government, is not a pension, and is therefore transferable—*Lachmi Narain v. Makund Singh*, 26 All. 617. An annual grant by Government as compensation for loss sustained by the grantee on account of improper resumption of rent-free land is not a pension—*Jiban Krishna v. Sripati*, 8 C.W.N. 665. Where the Government considerably raised the assessment of a certain estate and directed that out of the increased revenue, as an act of grace, the members of the family, other than the head of the family, should have certain shares assigned to them, it was held that the share of the revenue so assigned could not be held to be a pension—*Balkrishna v. Govind*, 1902 A.W.N. 161. The grant of a reward or bonus by Government is not a pension—*Khasim v. Carliet*, 5 Mad. 272. A *toda giras hak* which is an allowance made to *garasias* to preserve the peace of the country and to render police service if required is not a pension—*Secretary of State v. Khemchand*, 4 Bom. 432.

Political Pensions:—An allowance granted to a political prisoner detained under the provisions of the State Prisoners' Regulation III of 1818 is a political pension, and cannot be transferred. The allowance granted to the ex-Maharaja of Panna who is interned under the above Regulation is a political pension, and it is none the less a political pension simply because the Government of India instead of paying it out of its own funds makes some arrangement with the Panna Durbar under which the latter pays the money into the Government Treasury for the purpose of being disbursed to the ex-Maharaja—*Satraji Dongorchand v. Madho Singh*, 50 Mad. 711, 52 M.L.J. 622, A.I.R. 1927 Mad. 64, 103 I.C. 339.

60. Clause (h):—"Opposed to the nature of the interest":—The transfer of a service inam by the inamdar falls under this clause; such a transfer is opposed to the nature of his interest in the property. He is entitled to enjoy the property as long as he renders service. If he sells

the property, it is obvious that he can no longer perform the services, and further it is quite opposed to the nature of his interest and duty (*viz.*, that he should enjoy the produce of the land as salary for the services he has to render) that he should alienate it, leaving himself without the means of subsistence and without further interest in the performance of the services—*Anjaneyulu v. Sri Venugopala*, 45 Mad. 620 (624), A.I.R. 1922 Mad. 197, 70 I.C. 466.

So also, *ghatwali* tenures are non-transferable. See Note 54 *ante*.

61. Unlawful object or consideration:—Section 23 of the Indian Contract Act enacts:—

“The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

In order to bring in the operation of this clause, the object or consideration for the transfer should be unlawful. This clause would be inapplicable where the object or the consideration for the transfer is not unlawful, but the transfer is ineffective on some other ground—*Dip Narain v. Nageshar*, 52 All. 338 (F.B.), 1930 A.L.J. 45, 122 I.C. 872, A.I.R. 1930 All. 1 (2). Although the words ‘object’ and ‘consideration’ have been coupled together, they are distinguishable. The term ‘object’ means purpose or design. Thus, if the object of an assignment was to defeat the provisions of the Insolvency Act in such a manner as to prevent the property of the insolvent vesting in the Official Assignee and thereby becoming available for distribution under the provisions of that Act, such an object is unlawful and the transfer is inoperative under this section, although the transfer was supported by consideration—*Jaffar v. Budge Budge Jute Mills*, 33 Cal. 702 (709, 710); and on appeal 34 Cal. 289; *Chimniram v. Shibendra*, 16 C.L.J. 162, 14 I.C. 519.

62. Transfers forbidden by law:—Here the ‘law’ refers to some substantive law, and not to an adjective law such as the C. P. Code—*Hukum Chand v. Taharunnessa*, 16 Cal. 504. An alienation of the minor’s property by the certificated guardian without the sanction of the Court is voidable—Sec. 30, Guardians and Wards Act. A license granted under the excise law is a personal privilege, and the rights and privileges conferred by the license cannot be transferred by one private individual to another—*Behari Lall v. Jagadish*, 31 Cal. 798 (805). Where a person, who held the lease of a farm to retail opium at certain shops and whose lease contained a clause prohibiting subletting without the Collector’s sanction, entered into an agreement to sublet some of the shops, *held* that the agreement was void—*Raghunath v. Nathu*, 19 Bom. 626. Where the transfer of an occupancy right is forbidden by law, its transfer by the tenant is void—*Durga v. Jhinguri*, 7 All. 511 (514); *Jhinguri v. Durga*, 7 All. 878 (880) (F.B.). Where the object of a lease was to secure a higher rent than that allowed by the Calcutta Rent Act, the lease was void as it intended to defeat the provisions of that Act—*Salch Abraham v. Manekji*, 50 Cal. 491, A.I.R. 1924 Cal. 57, 75 I.C. 521.

This clause applies to cases where the transfer is forbidden by statute, and not to cases where the restriction on alienation is imposed by an *agreement* of parties or *decree* of Court—*Wazir Md. v. Har Prasad*, 15 O.C. 67, 13 I.C. 613 (615).

Fraudulent transfers:—See sec. 53 of this Act.

63. Transfers with immoral object:—Where the landlord knowingly let out his house to a prostitute to be used by her as a brothel, *held* that he could not recover rent—*Gaurinath v. Madhumani*, 18 W.R. 445, 9 B.L.R. App. 37; *Choga Lal v. Pujari*, 31 All. 58. If, however, the landlord was ignorant of the fact that the prostitute took the house for prostitution (and not for mere habitation), he could recover rent—*Sultan v. Nanu*, 22 P.R. 1877; *Pirthi Mal v. Bhagan*, 2 P.R. 1898. Where a person mortgaged his property in order to raise money for the purpose of getting his daughters taught singing, *held* that the mortgage was not void, in as much as amongst the community of the Naickens to which the mortgagor belonged, singing was not a necessary prelude to prostitution—*Khubchand v. Beram*, 13 Bom. 150. An assignment of a mortgage by a person to a woman, ostensibly for money consideration but really for the purpose of future illicit cohabitation with her is void and can be set aside at the instance of the assignor—*Muthukannu v. Shunmugavelu*, 28 Mad. 413. Where the donor made a gift of his property to a husband and wife on condition that he should have physical enjoyment of the latter, *held* that the consideration for the gift being future illicit connection, the gift was void under sec. 23 Contract Act—*Ghumna v. Ramchandra*, 47 All. 619, A.I.R. 1925 All. 437, 88 I.C. 411. But where a gift of a property was made by a person to his kept mistress on condition of her continuing to live with him, which was followed by possession of the property by her for a number of years, and afterwards a creditor of the donor sued for a declaration that the gift was invalid, *held* that even assuming that the consideration was immoral and illegal, the gift could not be set aside because of the long possession of the donee—*Lachmi v. Wilayti Begam*, 2 All. 433. But see *Sabava v. Yamanappa*, 35 Bom.L.R. 345, A.I.R. 1933 Bom. 209 (211), which holds that an immoral consideration does not become innocuous by passage of time. Similarly, where a deed of settlement was made with the object and in consideration of the donee cohabiting with the settlor, and the immoral purpose of the donor was achieved by the donee in fact remaining in his keeping as contemplated in the settlement-deed, *held* that the settlor could not afterwards avoid the deed and recover the property transferred for an immoral purpose *which had already been achieved*. It is a well-established rule of equity that when a transaction is entered into for unlawful and immoral purpose, and that purpose has been achieved, the Court will not interfere at the instance of a *particeps criminis* to relieve him from the legal effect of the transaction. Section 6 of the Transfer of Property Act does not modify this rule of equity but only lays down that the Court will not enforce a transfer which would have the effect of carrying out its unlawful object—*Deivanayaga v. Muthu Reddi*, 44 Mad. 329 (330, 332); *Sabava v. Yamanappa*, 35 Bom.L.R. 345, A.I.R. 1933 Bom. 209 (212); *Ayerst v. Jenkins*, (1873) 16 Eq. 275. But *past cohabitation* is not an immoral consideration, and a promise to pay a woman an allowance for such consideration has been held to be valid—*Dhiraj v. Bikramjit*, 3 All. 787; *Mankuar v. Jasodha*, 1 All. 478 (480). In some cases, however, a transfer in consideration of *past cohabitation* has been held to

be invalid—*Kisandas v. Dhondu*, 44 Bom. 542; *Husseinali v. Dinbai*, 25 Bom.L.R. 252, A.I.R. 1924 Bom. 135, 86 I.C. 240 (dissenting from 3 All. 787); *Sabava v. Yamanappa*, supra.

The fact that in the community to which the parties belong concubinage is allowed and is not regarded as immoral does not make a settlement made in consideration of concubinage any the less immoral—*Sabava v. Yamanappa*, supra.

64. Transfers opposed to public policy :—*Marriage brokage contracts*:—A contract according to the terms of which the father or guardian is to be paid money in consideration of giving his daughter or ward in marriage is against public policy and unenforceable in a Court of law—*Dholidas v. Fulchand*, 22 Bom. 42 and 22 Bom. 658; *Dulari v. Vallabhdas*, 13 Bom. 126; *Venkata v. Lakshmi*, 32 Bom. 185. An agreement to allow maintenance to the parents of a girl who had to enter into an unsuitable marriage is void as opposed to public policy—*Baldeo v. Jamna*, 23 All. 495. In some cases, however, it has been held that if the person who is remunerated in money or by way of maintenance stands in near relationship to the girl, the agreement is not void. Thus a promise made by a person to give his sister or daughter in marriage to the plaintiff in consideration of the latter paying a sum of money or any property to the promisor (brother or father of the girl) was held to be lawful, where it was not shown that the guardian was giving the girl to a husband otherwise ineligible—*Jogeshwar v. Panch Kauri*, 13 W.R. 154; *Ranee Lallun Monee v. Nabin Mohan*, 25 W.R. 32; *Bakshi Das v. Nadu Das*, 1 C.L.J. 261.

65. Maintenance and Champerty :—*Maintenance* means the stirring up of improper litigation with a bad motive for purposes contrary to public policy and justice. *Champerty* is a species of maintenance and of the same character, but with the additional feature of a condition or bargain providing for participation in the subject matter of the litigation—*Pitchakutty v. Kamala*, 1 M.H.C.R. 153.

In agreements of this kind the questions to be considered are, whether the agreement is so extortionate and unconscionable as to be inequitable against the borrower, and whether the agreement has been made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits so as to be contrary to public policy—*Ram Coomar v. Chunder Canto*, 2 Cal. 233 (P.C.); *Raja Mokham Singh v. Raja Rup Singh*, 15 All. 352 (P.C.); *Achal Ram v. Kazim Hosain*, 27 All. 271 (P.C.); *Bhagwat Dayal v. Debi Dayal*, 35 Cal. 420 (P.C.); *Gokuldas v. Lakshmidas*, 3 Bom. 402. Cases may be easily supposed in which it would be in furtherance of right, justice and necessity to resist oppression, and a suitor, who had a just title to property and no means except the property itself, would be assisted in this manner. Therefore a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. Thus, where a person is himself unable to prosecute a suit, a contract made in good faith to supply him with funds to carry on the suit, on the security of the property in dispute, will be enforced—*Ram Coomar v. Chunder*, 2 Cal. 233 (P.C.). The law does not prevent persons from transferring the subject matter of a litigation in order to obtain the means of prosecuting it—*Khudiram v. Shomnath*,

37 C.W.N. 706 (708), A.I.R. 1933 Cal. 454. But it is a high offence at common law to buy or sell any doubtful title to lands known to be disputed, with the intent that the buyer may carry on the suit which the seller does not think it worth his while to do and on that consideration sells his pretensions at an under-rate. All practices of this kind are by all means to be discountenanced as manifestly tending to oppression by giving opportunities to rich men to purchase the disputed titles of others to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons which, perhaps, they may successfully enough maintain against their proper adversaries—Hawkin's *Pleas of the Crown*, Vol. I, p. 470.

So, an assignment, merely with a view of litigation, to a person who, but for the litigation would have no interest whatever in the subject-matter of the assignment, is champertous—*Gokuldas v. Lakshmidas*, 3 Bom. 402. An agreement between pleader and client for the supply of funds for the litigation of the latter, in consideration of the former getting a share of the property in suit on its success, is void—*In re Ali Muhammad Mukhtear*, 111 P.R. 1894.

66. Persons disqualified to be transferees :—See sec. 136 of this Act, under which Judges, legal practitioners, mukhtears, and other officers connected with Courts of Justice are disqualified from purchasing any actionable claims.

Minors are not included in the term 'persons disqualified.' There is no provision in the T. P. Act under which a minor is incapable of being a transferee of property. Sec. 7 which speaks of persons competent to contract applies only to a *transferor*, and does not prevent a minor from being a *transferee* of property. The Privy Council decision in *Mohori Bibi v. Dharmadas* (30 Cal. 539) declaring contracts by minors to be void does not apply to a transfer *in favour* of a minor—*Muni Koer v. Madan Gopal*, 38 All. 62; *Narain Das v. Dhaniala*, 38 All. 154; *Ulfat v. Gouri Shankar*, 33 All. 657. So also, a mortgage executed in favour of a minor who has paid the consideration, is valid and enforceable—*Raghava Chariar v. Srinivasa*, 40 Mad. 308 (315) (F.B.) (overruling *Navakotti Narayana v. Loyalinga*, 33 Mad. 312); *Zafar Ahsan v. Zubaida*, 1929 A.L.J. 1114, 121 I.C. 398, A.I.R. 1929 All. 604 (605). But where the transfer to a minor involves certain covenants which are to be performed by the minor, *e.g.*, in case of a *lease* to a minor, in which the minor agrees to pay rent and to perform any particular covenants which form an essential part of the transaction, the transfer (lease) is void, as it falls within the mischief of the rule laid down in *Mohori Bibi's case* (30 Cal. 539)—*Pramila v. Jogesher*, 3 P.L.J. 518 (521, 522).

Where a clause in a grant prohibits a transfer to a person who does not hold a certain certificate, the person who does not hold the certificate should not be regarded as a person legally disqualified to be a transferee, and there is no basis for holding that the transfer to such a person is void *ab initio* and cannot be validated by a subsequent removal of the disqualification—*Maung Ye v. M. A. S. Firm*, 6 Rang. 423, A.I.R. 1928 Rang. 136, 111 I.C. 105.

A Buddhist monk may hold property such as paddy land, and he may be a transferee of such property. He is not legally disqualified to be a transferee, and the transfer to him is valid—*U Pyinnya v. Maung Law*, 7 Rang. 677 (F.B.), A.I.R. 1929 Rang. 354 (360).

67. Clause (i) :—This clause which is identical with the second para of section 108 (j) has been inserted by the Transfer of Property Amendment Act of 1885, in order to remove any doubt which might arise in view of sec. 117, as to its applicability to leases for agricultural purposes.

An occupancy tenant holding an untransferable right of occupancy cannot transfer his right out and out by sale; but he can hypothecate such right—*Gopal Panday v. Parshotam*, 5 All. 121 (explained in 13 All. 28). In Bengal, the transfer of an occupancy holding has now been expressly permitted by sec. 26B of the Bengal Tenancy Act (as amended in 1928). For a case of relinquishment by a tenant of his agricultural holding, in Oudh, see *Amar Nath v. Har Prasad*, 7 Luck. 425, A.I.R. 1932 Oudh 79, 136 I.C. 333.

If a non-transferable occupancy-holding is mortgaged along with certain other properties which are transferable, the whole transaction is not bad, if without defeating the provisions of this Act part of the mortgage can be enforced—*Dip Narain v. Nageshar*, 52 All. 338 (F.B.), A.I.R. 1930 All. 1 (3), 122 I.C. 872.

The interests which are declared inalienable by this clause are particular interests which have been created by *statutes* enacted to regulate the relations between landlord and tenant. An interest conferred by a *decree* is not covered by this clause. There is an essential distinction between restrictions on transfers imposed by the Legislature, and restrictions imposed by contract or decree. Where the Legislature deem it expedient to fetter the privilege of free alienation, the prohibition founded upon considerations of public interest must be treated as absolute. But no such force can be attributed to a restriction which has its origin in an agreement of the parties or a decree of Court. The contract or decree does not purport to affect the rights and interests of any one but the parties themselves; it merely regulates the relations of the parties *inter se*. Consequently, where there is a decree of Court settling the rights of two parties, which contains a provision that one of them (tenant) shall not alienate the property which he has got from the other, the presumption is that the condition against alienation is inserted for the benefit of the other party (superior proprietor). The latter may waive the benefit of the condition and if he elects to do so by giving his consent to a transfer, the transfer is a valid transaction—*Wazir Muhammad v. Har Prasad*, 15 O.C. 67, 13 I.C. 613 (614, 615).

7. Every person competent to contract, and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property, either wholly or in part and either absolutely or conditionally in the circumstances, to the extent, and in the manner allowed and prescribed by any law for the time being in force.

68. Persons competent to contract :—Under section 11 of the Indian Contract Act, "every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

Minors:—It has now been settled by the Privy Council that a minor is incapable of contract, and that his contract is not only voidable but void

—*Mohori Bibi v. Dharmodas*, 30 Cal. 539 (P.C.). A minor is therefore incompetent to make a transfer of his property by sale, mortgage or lease.

A lease by a minor is void. That it was executed only by the lessee in favour of the lessor (by means of a *kabuliyat*) and not by the lessor (by means of a *patta*) does not cure its invalidity. The fundamental conception of a lease involves the transfer by the lessor. A lease is essentially a bilateral contract—*Govinda v. Chowakkaran*, 59 M.L.J. 941, 129 I.C. 449, A.I.R. 1931 Mad. 147 (149). See the amendment made in sec. 107.

But there is nothing in this Act to prevent a minor from *being a transferee* (purchaser) of property and from suing to recover possession of that property. See Note 295 under sec. 54, and Note 66 under sec. 6.

Lunatics:—A lease of property granted by the lessor at a time when he was mentally unfit and incapable of understanding the effect of the transaction is void—*Amina Bibi v. Saiyed Yusuf*, 44 All. 748 (752), 20 A.L.J. 731, A.I.R. 1922 All. 449.

A disposition of property by a lunatic during a lucid interval is considered as done by a person perfectly capable of contracting, managing and disposing of his affairs at that period—*Hall v. Warren*, 9 Ves. 605 (*per Eldon L. C.*).

Disqualified proprietors:—A proprietor whose property is under the management of the Court of Wards cannot validly transfer his property. Thus, a mortgage entered into by a Government ward in contravention of the provisions of sec. 23 of the Central Provinces Government Wards Act, is absolutely void—*Jirwan Lal v. Gokul Das*, 17 C.P.L.R. 13. A mortgage by a person whose estate is under the management of an officer under the Jhansi Encumbered Estates Act is not valid, and the mortgagee cannot invoke the assistance of sec. 43 to compel the disqualified mortgagor to make good his transfer after the removal of his disqualification—*Radhabai v. Kamod Singh*, 30 All. 38.

69. Pardanashin ladies:—Transactions with pardanashin women are almost placed on the same footing as transactions with minors or other persons of limited capacity.

A Hindu *pardah* woman is entitled to receive in Court that protection which the Court of Chancery in England always extends to the weak, ignorant and infirm who are likely to be imposed on by the exercise of undue influence over them. The undue influence is presumed to have been exercised until the contrary is shewn. It is, therefore, always incumbent on the person who is dealing with a *pardah* lady to show that its terms are fair and equitable, and that the lady had good independent advice in the matter and acted therein altogether at arm's length from the other contracting party—*Kanailal v. Kamini*, 1 B.L.R. (O.C.) 31N. But where a lady attended to her own business herself, communicated in matters of business with men other than members of her own family, was able to go to Court to give evidence in litigation, and was able to attend at the Registration office in person to acknowledge her deeds for the purpose of registration, *held* she could not be spoken of as a *pardanashin* lady, and documents executed by her need not be looked upon with the same amount of scrutiny and suspicion as documents executed by females are generally looked upon—*Ismail Messajee v. Hafiz*, 33 Cal. 773 (783) (P.C.).

To charge a *padanashin* woman upon an instrument alleged to have been executed by her, it must be shown by satisfactory evidence that the

document was explained to and understood by her—*Sudisht Lal v. Sheo-barat*, 7 Cal. 245 (P.C.) ; *Shambati v. Jago*, 29 Cal. 749 (P.C.) ; *Sumsuddin v. Abdul*, 31 Bom. 165 (180) ; *Amirbai v. Abdul*, 3 Bom.L.R. 658 ; *Achan v. Thakur Das*, 17 All. 125 ; *Shamsundar v. Achhan Kunwar*, 21 All. 71 (P.C.). But to validate a transaction with a pardanashin lady, it is not necessary to prove that she understood every detail of the matter. It is sufficient that she should understand its general effect, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise her to enter into it—*Sunitibala v. Dhara Sundari*, 47 Cal. 175 (P.C.). But this will not suffice in the case of a pardanashin lady who is *illiterate*. In such a case the Court will require much stranger evidence that there was intelligent execution of the deed, especially when it appears that the transaction was much against the lady's interests—*Mushrafi Begum v. Kundan Lal*, 10 O.W.N. 724, A.I.R. 1933 Oudh 365 (369), 144 I.C. 860.

71. Person authorised to dispose of transferable property not his own:—These persons include the manager of a joint Hindu family, guardian (see secs. 27 and 29, Guardians and Wards Act), executor, administrator (sec. 307, Indian Succession Act, 1925) and trustee (secs. 11 and 12, Indian Trusts Act).

A man has no right to deal with property which is not his own, and unless he can show some right to deal with it either as agent or guardian of the owner or as trustee or the like, any transfer which he purports to make cannot bind the lawful owner. Section 7 of the T. P. Act embodies this principle—*Chitu v. Charan Singh*, A.I.R. 1923 All. 563 (564), 77 I.C. 705.

If a person (*e.g.*, the manager or Karnavan of a tarwad) is authorised to dispose of the tarwad property absolutely and without condition, any false recital as to under what particular state of facts he obtained his power to convey, does not affect the title of the transferee, provided the transferor has got the power to give an absolute title and professes to convey such absolute title—*Subramania v. Krishna*, 39 M.L.J. 590, 60 I.C. 77 (80).

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Operation of transfer.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth ;

and where the property is machinery attached to the earth, the moveable parts thereof ;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith ;

and where the property is debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

This section corresponds to sections 63 and 6 of the English Conveyancing Act, 1881 (44 & 45 Vict., C. 41). The object of this section is to cut down the length of deeds and to simplify them by doing away with the description of the minute details and incidents of the property intended to be conveyed. These incidents will be implied to be automatically conveyed by this section.

72. Scope:—This section is inapplicable to transfers by execution sales—*Subbaraju v. Seetharamaraju*, 39 Mad. 283 (286). See sec. 2 (d). But in an Allahabad case, the principle of this section, though not the section itself, has been applied to a Court-sale. Thus, if the property is at the date of auction-sale subject to a charge, the purchaser gets only what the “transferor is capable of passing,” that is, he takes the property subject to the charge, and cannot disregard it; he is not clothed with a higher interest in the property than what the transferor was capable of passing—*Nathan Lal v. Durga Das*, 52 All. 985, 1930 A.L.J. 1267, 130 I.C. 489, A.I.R. 1931 All. 62 (64).

73. “Unless a different intention is expressed or implied”:—Where a property is transferred, unless there is ambiguity in the document effecting the transfer, an intention to reserve a certain right cannot be necessarily implied under this section except from the terms of the document itself. If the document, however, is ambiguous, a Court can consider the object of the grantor and other circumstances attending its execution and the acts of the parties since the date of its execution—*Suresh v. Surendra*, 37 I.C. 870 (871) (Cal.).

In order to gather the intention of the grantor, it is necessary that the whole instrument should be read—*Kalidas v. Kanhaiyalal*, 11 Cal. 121 (131) (P.C.). To ascertain the rights of the grantee, the language of the instrument and the intention of the parties, as well as the estate held by the grantor, have to be taken into consideration—*Megh Lal v. Raj Kumar*, 34 Cal. 358. The word “*malik*” as applied to the grantee in a deed of grant imports full proprietary rights, unless there is something in the text to indicate a contrary intention. Where the word “*malik*” is not used but it is said that the grantee (a female) and the sons born of her womb and the sons born of their loins in succession and the daughters born of the grantee’s womb shall enjoy the property in succession with right of transfer by sale and gift, then also an absolute estate is conferred as if the grantee was constituted *malik* of the property—*Sarajubala v. Jyotirmoyee*, 59 Cal. 142 (P.C.), 35 C.W.N. 903 (906), A.I.R. 1931 P.C. 179, 134 I.C. 648. Where a gift “making over certain taluks to the donee” was preceded by the words “in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control,” *held* that the words of the gift were limited by its purpose, and the donor’s intention as gathered from the whole instru-

ment was that the donee should take the property for life only—*Kalidas v. Kanhayalal*, 11 Cal. 121 (131) (P.C.). The words '*istimrari mokurari*' in a pattah granting land do not *per se* convey an estate of inheritance; but it is also true that such an estate may be created without the addition of such expressions as "*ba farzandan*" (with children) or "*vaslan bad vaslan*" (generation after generation). Without them, the other terms of the instrument, the circumstances under which it has been made, or the conduct of the parties, may show the intention with sufficient certainty to enable the Courts to pronounce the grant to be perpetual—*Tulshi Pershad v. Ram Narain*, 12 Cal. 117; *Gaya v. Ramjivan*, 8 All. 569. The grant of a *mokurari ijara* at a fixed rent in a mauza may be only for the life of the grantee; and in the absence of words importing perpetuity, the question to be considered is whether the intention of the parties is shown by the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties, with sufficient certainty to enable the Court to pronounce that the grant was perpetual—*Bilasmani v. Raja Sheopershad*, 8 Cal. 664 (P.C.). A condition in a lease that the tenant will not be ejected so long as he pays the rent due from him and remains obedient, is at best good only for the lifetime of the tenant and creates no heritable estate—*Madho Singh v. Deputy Commissioner*, 8 O.C. 61. In the absence of anything to the contrary, the simple grant of an annuity conveys only a life interest to the grantee. The mere circumstance that an annuity is continued after the life of the first grantee or that it is being charged on village revenues does not lead to an inference that it is of absolute duration, and does not indicate an intention to create an annuity as co-equal with the duration of the property itself—*Gopal Krishna v. Ramnath*, 5 Bom.L.R. 729. In the absence of direct evidence of its terms or territorial custom to the contrary, a *khorphosh* grant cannot be presumed to be of greater duration than for the lifetime of the grantee. Such a grant cannot be presumed to be more than a grant of the rents and profits, and does not carry with it a right to open mines and remove minerals which are properties of the soil—*Tituram v. Cohen*, 33 Cal. 203 (P.C.). Trees standing on the land pass to the purchaser on a sale of the land; the mere fact that the trees had been prior to the sale of the land mortgaged to another person and no mention of the mortgage is made in the sale-deed, does not lead to the inference of a "different intention" to the effect that the vendor's interest in the trees should not pass to the purchaser of the land—*Pandurang v. Bhimrao*, 22 Bom. 610 (612).

If the purchaser of a property refuses to produce the deed of conveyance, it is impossible to ascertain whether a 'different intention is expressed or necessarily implied' and the Court will not be entitled to hold that any easement passed by virtue of this section to the purchaser as a legal incident of the property—*Wutzler v. Sharpe*, 15 All. 270 (289).

74. Transfer passes transferor's entire interest:—Unless there is an express or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted. Consequently, if the words employed are clear and unambiguous, no matter who the donee is, whether a male or a female, the language of the gift must be given effect to. Broadly speaking, it may be said that if the language of the instrument is capable of conferring an estate of inheritance, considerations regarding the sex of the donee should be dis-

carded. Where the language is ambiguous, then recourse can be had to the personal law of the donee and the rule of inheritance applicable to him or her in finding out what the intention of the donor was (*i.e.*, whether he intended to confer an absolute estate or a mere life-estate on the female donee)—*Rama Chandra v. Ram Chandra*, 42 Mad. 283 (290, 291). This section, which provides that a transfer of property passes the transferor's entire interest to the transferee, must be read subject to the provisions of sec. 2 (old) which lays down that nothing in this chapter shall be deemed to affect any rule of Hindu law. It is a rule of Hindu law as understood in Mithila that a gift by a Hindu to his wife does not carry with it the right to alienate. This rule of Mithila law is unaffected by sec. 8 of the T. P. Act—*Hitendra v. Rameswar*, 4 Pat. 510, A.I.R. 1925 Pat. 625, 87 I.C. 849. And the omission of the word "Hindu" from sec. 2 has not changed the Hindu Law in this respect.

On a transfer of a village, all the interest possessed by the proprietor in that village passes to the transferee, *e.g.*, houses and graves situate in that village—*Krishna Kumari v. Rajendra*, 2 Luck. 43, 13 O.L.J. 846, 104 I.C. 155, A.I.R. 1927 Oudh 240; *Bhagabutti v. Bholanath*, 1 Cal. 104 (P.C.). The sale of the rights and interests of a zemindar in a village passes also the buildings appurtenant to the zemindari rights—*Abu Hasan v. Ramzan*, 4 All. 381 (382); *Banke Lal v. Jagat Narain*, 22 All. 168 (172, 173).

Where the grantor has used unqualified words of conveyance, he cannot subsequently claim to have reserved any rights in the property—*Tarachand v. Lakshman*, 1 Bom. 91 (94). The rule as to the construction of the language of a grant is that indefinite words are calculated to convey all the interests of the grantor—*Kalidas v. Kanhayalal*, 11 Cal. 121 (131) (P.C.). If a person is the executor of the estate of his father, and has, as one of his several sons, a beneficial interest in the estate left by his father, and then he executes a sale-deed along with his other brothers, the deed will convey all the right and title which all the brothers possessed in the property, and this will undoubtedly include the right and title which the first-named person possessed *as executor*, although he did not expressly state in the deed that he was conveying the property in his capacity as executor. The meaning of a deed is to be decided by the language used, interpreted in a natural sense; and there being nothing in the deed to show that only his beneficial interest was to be sold, his interest as executor would also pass—*Bijraj Nopani v. Pura Sundary*, 42 Cal. 56 (64-66) (P.C.); *Gangabai v. Sonabai*, 40 Bom. 69.

A Mahomedan executed a sale-deed of the whole of his property in favour of his mother R and then died. The conveyance was ultimately declared to be void, but before such declaration the mother dedicated a portion of the property to a *wakf*. The question arose whether the dedication was valid to the extent of the one-third share which she inherited from his son. The High Court held that the *wakf* did attach to the one-third share. When R transferred the property to *wakf*, she passed not only such title as she had acquired or believed to have acquired from her son by virtue of the sale-deed, but also such title as she had, as a matter of fact, acquired by inheritance on the death of her son. And if R's title to the whole property, by purchase from her son, failed, her other title, *viz.*, title by inheritance to the one-third share passed to the *wakf*—*Fazal Ahmad v. Har Prasad*, 1929 A.L.J. 620 (F.B.), A.I.R. 1929 All. 465 (475,

476), 116 I.C. 1. But the Privy Council has reversed this decision, remarking that since the sale-deed was invalid, the *wakf* fell with it and was not valid even to the extent of R's share inherited from her son, and that sec. 8 did not apply to the case—*Har Prasad v. Fazal Ahmad*, 55 All. 83 (P.C.), 1933 A.L.J. 331, 37 C.W.N. 490 (494), A.I.R. 1933 P.C. 83, 142 I.C. 217.

75. Legal incidents thereof:—*Incident* has been defined in Wharton's Law Lexicon as a "thing necessarily depending upon, appertaining to or following another that is more worthy, as rent is incident to a reversion." Webster defines it as "something appertaining to or passing with or depending on another called the principal."

Examples:—An assignment of the subject matter of a suit carries with it the right to continue the suit and consequently the right to be brought on the record as plaintiff—*Commercial Bank v. Sabju*, 24 Mad. 252. A liability to pay customary dues known as *haq-i-chaharum* is of the nature of an incident attaching to land, and may be enforced against the vendee unless it is limited by a right to claim it from the vendor—*Dhandia v. Abdur Rahman*, 23 All. 209. The right of pre-emption attached to ownership is a legal incident of the property and passes along with it—*Bhajan v. Mushtaq Ahmed*, 5 All. 324 (330) (F.B.). The title-deeds of an estate, counterparts, leases and other documents of the like kind such as *kabuliyats* are regarded as necessary to the estate and pass with it, whether the transfer is made by a conveyance, decree or certificate of sale—*Sri Bhavani v. Devrao*, 11 Bom. 485; *Harrington v. Price*, 3 B. & Ad. 170. A right of property carries with it the right to execute decrees obtained in respect of such property. Thus, the purchaser of a village is entitled to execute decrees for ejectment obtained by the vendor against the tenants of the village for non-payment of rent, except when the decrees are personal as in the case of decrees for pre-emption or when they relate to past profits—*Onkardas v. Shahbaz Khan*, 1 N.L.R. 48. Where the right to unpaid purchase-money is transferred, the lien for the unpaid purchase-money also goes with it to the transferee—*Sambasiva v. Venkatarama*, 51 M.L.J. 95, A.I.R. 1926 Mad. 903, 95 I.C. 447. A covenant for renewal is a covenant running with the land, and therefore where a grantee of land for a term of years transfers his interest, the right to renewal goes with the transfer unless there is an express or ~~implied~~ ^{implied} intention in the document of transfer to the contrary—*Jogendra v. Miasha*, 12 Bur.L.T. 133, 9 L.B.R. 268, 51 I.C. 360.

But an injunction does not run with the land. Hence if a property regarding which an injunction is granted is sold under a decree, the vendee thereof cannot be made amenable to the injunction—*Dahyabhai v. Bapalal*, 3 Bom.L.R. 564; *Attorney-General v. Birmingham Drainage Board*, 17 Ch. D. 685.

The goodwill of a trade or business passes with the premises—*Hall v. Barrows*, 4 DeG. J. & S. 150; *Re David and Matthews*, [1899] 1 Ch. 378. Similarly, trademarks and trade names denoting the goods of a particular manufacturer would pass with the sale of the business to which they relate—*Singer Manufacturing Co. v. Loog*, 18 Ch. D. 395; 8 App. Cas. 15; *Siegart v. Findlater*, 7 Ch. D. 801.

76. Easements annexed thereto:—"What meaning the Indian Legislature intended to express by the use of the word "annexed" we are unable to ascertain. It is not in this connection at least an ordinary term

of law, and this Act does not define it"—*Wutzler v. Sharpe*, 15 All. 270 (284). The term has not even been defined in the Easements Act (V of 1882). Easements 'annexed' may mean those considered as appurtenant thereto, as held in England—*Ibid* (at p. 288). But the term does not mean an easement which first came into existence as a consequence of a transfer of a house or land; it means those easements which at and prior to the transfer were existing easements—*Ibid* (at p. 290).

Under section 19 of the Indian Easements Act (V of 1882) an easement passes to the transferee with the dominant heritage. Thus A has a certain land to which a right of way is annexed. A lets the land to B for 20 years. The right of way vests in B and his legal representatives so long as the lease continues. (Illustration to section 19, Indian Easements Act).

The reason for the rule as to easements going with the property is that the disposition of the property by the owner is supposed to have been with reference to the best way of enjoying it, and the best way of selling the property and realising the full value of it is to sell it with such rights as the owner thought should be attached to particular parts of it. When a person grants a portion of land, he grants with it all the easements and quasi-easements which had been formerly used and which were necessary thereto. Even where the grantor reserves a portion of the property to himself, the easements of necessity which had been enjoyed by the part granted over the part reserved go with the former, and the transferor is also entitled to exercise the rights of easements of necessity over the transferred land. Question of this character frequently arises in cases of partition of the premises. See *Kadombini v. Kali Kumar*, 26 Cal. 516; *Charu v. Dokowri*, 8 Cal. 956; *Bolye v. Lalmoni*, 14 Cal. 797; *Purshotam v. Durgoji*, 14 Bom. 452 (454); *Attar Singh v. Jawahir*, 60 P.R. 1888; *Sultani v. Ram Saran*, 49 P.R. 1900. It is only the easements of necessity or continuous easements that pass by implication of law—*Polden v. Bastard*, L.R. 1 Q.B. 156 (161). And if the easements are not easements of necessity, the transferor cannot exercise them against the transferee unless they are expressly reserved to the transferor in the deed of conveyance—*Chunilal v. Manishankar*, 18 Bom. 616; *Attar v. Jawahir*, *supra*; *Wheeldom v. Burrows*, 12 Ch. D. 31.

An easement is extinguished when either the dominant or the servient heritage is completely destroyed (Indian Easements Act, sec. 45), or when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages (*Ibid*, sec. 46).

77. Rents and Profits:—This section speaks of rents and profits accruing *after* the transfer. The right to recover rents and profits which have accrued to the property *prior* to the date of assignment does not pass with the property unless the right is expressly conveyed—*Ganesh v. Shannarain*, 6 Cal. 213; *Bhogilal v. Jethalal*, 30 Bom.L.R. 1588, A.I.R. 1929 Bom. 51, 114 I.C. 262; *Muthu v. Nevanathi*, 12 L.W. 44, 58 I.C. 383. This section says that only the rents and profits accruing *after* the sale must be regarded as included in the legal incidents of the property. But as to profits that accrued due *prior* to sale, it cannot be said that they are subsidiary to the enjoyment of the property. It cannot be said that to make a sale operative and effective, the right to collect past profits must be conveyed to the vendee—*Chandrasekaralingam v. Nagabhushanam*, 53 M.L.J. 342, A.I.R. 1927 Mad. 817, 104 I.C. 409. The purchaser of a village is not

entitled to execute decrees which relate to rents and profits which had accrued prior to the transfer—*Onkardas v. Shabaj*, 1 N.L.R. 48.

78. “Things attached to the earth”:—For the meaning of the term ‘attached to the earth’ see notes under section 3.

Trees, crops:—Trees and shrubs being rooted to the earth are deemed to be ‘attached’ thereto, and so long as they are attached they form part of the soil to which they are attached; hence the sale of a house and compound would comprise the trees and growing crops thereon unless they are expressly excepted—*Faquir Sonar v. Khuderam*, 2 N.W.P. 251; *Land Mortgage Bank v. Vishnu*, 2 Bom. 670 (673); *Pandurang v. Bhimrao*, 22 Bom. 610 (611); *Ramlinga v. Samiappa*, 13 Mad. 15 (16); *Iqbal Husen v. Nand Kishore*, 24 All. 294 (297). A lease of land carries with it to the tenant a right to the trees standing on the demised land so as to entitle him to their usufruct—*Shaik Mohammed Ali v. Bolakee*, 24 W.R. 330. A tenant at fixed rates has a transferable right in his holding which includes a transferable right in the trees growing thereon—*Harbans Lal v. Maharaja of Benares*, 23 All. 126.

Bamboo trees standing on the land are “attached to the earth” and pass to the transferee upon a transfer of the land—*Jagmohan v. Emp.*, 13 P.L.T. 519, A.I.R. 1932 Pat. 344 (345).

Buildings:—The ordinary rule of law is that the buildings erected on the land and all other fixtures should go with the land—*Ramdhone v. Ishanee*, 2 W.R. 123. Where land is transferred, all the houses standing thereon would pass by necessary implication, in the absence of words in the deed showing an intention to retain them—*Asgar v. Mahomed Mehdi Hassan*, 30 Cal. 556 (564) (P.C.). A verandah, the lower part of which is supported on posts fixed to the ground, is a thing attached to the earth—*Penry v. Brown*, 2 Stark 403. Where immoveable property is hypothecated, the fixtures pass to the mortgagee—*Hari Pada v. Anath Nath*, 22 C.W.N. 758 (759), 44 I.C. 211.

Agricultural fixtures:—The purchaser of lands irrigated by a tank becomes entitled to the use of the water of the tank for the purpose of irrigating the lands—*Venkata v. Secretary of State*, 12 M.L.J. 432. The grant of a village with all “wells, tanks and waters” within its boundaries does not necessarily pass to the grantee an artificial channel which was in existence before the grant of the village and which ran through that and two other villages and in the enjoyment of which those villagers were equally interested—*Ambalavana v. Secretary of State*, 28 Mad. 539.

Although an agricultural tenant may possibly be justified in digging up shells for cultivating the land properly and in a husband-like manner, the property in the shells is not in him, but in the landlord; and in the absence of a local custom, the tenant has no right to convert the shells so dug up to his own use—*Chaladom v. Kakkath Kunhambu*, 25 Mad. 669 (671); *Tucker v. Linger*, L.R. 8 A.C. 508; *Elwes v. Briggs Gas Co.*, 33 Ch. D. 562.

Minerals:—The rights of the grantee of a land to the minerals underground must depend upon the terms of the deeds by which they are conveyed or reserved—*Rowbotham v. Wilson*, 8 H.L.C. 348 (at p. 360). The Zemindar is presumed to be the owner of the mineral rights appertaining to a tenure, in the absence of evidence that he parted with them. Therefore on the grant of a mokarari lease by the Zemindar, the mineral

rights do not by implication pass to the tenant—*Hari Narayan v. Sriram*, 37 Cal. 723 (P.C.) (reversing *Sriram v. Hari Narayan*, 33 Cal. 54, and practically overruling *Meghlal v. Raj Kumar*, 34 Cal. 358); *Tituram v. Cohen*, 33 Cal. 203 (P.C.).

Factory includes machinery:—On a mortgage of a factory (which is immoveable property) the fixed machinery would also be comprised within the factory—see *Aniratlal v. Keshavlal*, 28 Bom.L.R. 939, A.I.R. 1926 Bom. 495 (496), 98 I.C. 696. But see *Muni Lal v. Kishore Chand*, 28 P.L.R. 325, 103 I.C. 742, A.I.R. 1927 Lah. 373 (374).

79. House and its easements:—The transfer of a house passes with it the easements annexed thereto. Thus, where a person has a right to use a drain or passage as incidental to his property, such right may be enjoyed at all times by any person who may be placed in his shoes in regard to the property. So a tenant may also enjoy that right—*Amjudée Begum v. Syed Ahmad*, 6 W.R. 314. The purchaser of a house acquires the right to the use of the way over a definite path communicating with the house, which the vendor of the house had been enjoying—*Nabeen Chander v. Bhooban Chander*, 15 W.R. 526.

80. Doors, windows, etc.:—Doors and window shutters of a *pucca* building form part of the immoveable property and have no separate existence—*Peru Bepari v. Ronuo*, 11 Cal. 164 (166).

House does not include machinery:—In cases where business is carried on in the premises, and the sale is only of the premises and not of the business as a going concern nor of the premises together with the fixtures or machinery, *prima facie* all that the purchaser is entitled to are the buildings. It can hardly be the intention of the parties when they sell the building alone without reference to the machinery or the business, that the purchaser should get the valuable machinery in the building by calling them fixtures and by claiming to get them under that head. *The technical English law of fixtures is not applicable to India*. The provisions as to fixtures are contained in sec. 8 of the T. P. Act, under which the transfer of a house carries with it “all other things provided for permanent use.” A machinery brought into a house for carrying on a business is not a thing provided for the permanent use of the house and is not necessary for the beneficial enjoyment of the same. Therefore, on a sale of the house the machinery does not pass to the purchaser—*Narayana v. Balaguruswami*, 45 M.L.J. 385, 79 I.C. 838, A.I.R. 1924 Mad. 187 (188); *Veerappa v. Ma Tin*, 4 Bur.L.J. 52, 88 I.C. 1011, A.I.R. 1925 Rang. 250.

81. Debt—Securities:—The words used in the penultimate clause of this section are “debts or other actionable claim”; consequently a debt secured by mortgage of immoveable property does not come under this clause, as it is not an actionable claim. But a difficulty arises with regard to the application of this clause to a promissory-note secured by deposit of title-deeds. In a Madras case it has been held that where a promissory note secured by a deposit of title-deeds was endorsed over to the plaintiff *for collection*, and title-deeds were also delivered over to him, and the plaintiff brought a suit to enforce the equitable mortgage, *held* that along with the transfer of the promissory-note-debt by the endorsement the equitable mortgage passed thereunder to the transferee by operation of this section, and the plaintiff was entitled to enforce the equitable mortgage, and not to sue upon the promissory note alone—*Cunniah v. Gopala Chettiar*,

1919 M.W.N. 613, 52 I.C. 879. In this case, the endorsement was *for collection* and hence the endorsement of the pro-note was sufficient to pass the security. But if the endorsement is *for value*, it amounts to a *sale*, and a sale of a mortgage-debt (even though it is a promissory-note-debt secured by an equitable mortgage by deposit of title-deeds) can be made only by a registered instrument. Consequently, if the promissory-note is simply transferred by *endorsement*, without the transferor taking care to transfer the mortgage right by a registered instrument, the debt and the security will get dissociated, and the security will cease. The transferee will get only the right to the debt but not to the security. Section 8 cannot apply to such a case, because that section applies only to a debt or other actionable claim, and not to a mortgage-debt—*Elumalai v. Balakrishna*, 44 Mad. 965 (969) (distinguishing *Cuniah v. Gopala*, *supra*). In another Madras case, however, Wallis C.J., went to the length of saying that even if a promissory-note secured by deposit of title-deeds was transferred by mere endorsement, this section operated to pass the right to the security along with the right to the debt—*Perumal v. Perumal*, 44 Mad. 196. But this case has been dissented from in 44 Mad. 965 *supra*.

Recently it has been decided by the Privy Council that debt and security are separate, that debts due to a person exist as his moveable property and do not, if secured, become identified with the security or transformed into it, whether the security is immoveable or moveable property; that a debt without the security is transferable under this Act; and that consequently, when both debt and security are transferred, and the transfer of the security fails for want of a registered instrument, the transferee can have no right or interest in the security, but the transfer of the debt still subsists and the transferee will be entitled to all sums received by the transferor in reduction of the debt, whether from realisation of the security or otherwise—*Imperial Bank of India v. Bengal National Bank*, 59 Cal. 377 (P.C.), 35 C.W.N. 1034 (1039), A.I.R. 1931 P.C. 245, 134 I.C. 651.

If the debt is merged in a *decree*, the transfer of the decree does not carry with it the securities of the debt, and the purchaser is not entitled to maintain a suit on the securities. Thus, the purchaser of a simple money-decree passed on a simple mortgage-bond does not acquire a lien on the property mortgaged—*Ganpat v. Sarupi*, 1 All. 446 (447).

82. Interest :—On a transfer of bonds, promissory notes, etc., the interest follows the principal and passes to the transferee. Interest cannot be allowed when the principal debt becomes irrecoverable, for interest is but an accessory to the principal, and when the principal is barred by limitation, the interest is also barred—*Dhondiram v. Taba*, 27 Bom. 330 (333); *Hollis v. Palmer*, (1836) 2 Bing N.C. 713.

A stipulation for payment of interest upon arrears of rent is an ordinary incident of a tenancy in this country, unless there is something unusual in the stipulation, and as a rule, it attaches to the tenancy so that a purchaser of the tenancy will also be bound by the stipulation—*Raj Narain v. Panna*, 30 Cal. 213.

*Arrears of interest :—*Under this section, the *arrears* of interest which accrued due before the assignment of a debt are not included in the legal incidents of the property in the debt; but they are part of the debt itself and must, in the absence of words to the contrary, pass as a matter of course to the transferee along with a transfer of the debt itself. The

arrears of interest formed part of the interest which the transferor was capable of passing in the property, and it must be held under sec. 8 that the assignment was intended to exhaust the transferor's interest in the property—*Maung Tha v. N. C. Chatterjee*, 27 I.C. 896, 8 Bur. L.T. 121.

9. A transfer of property may be made without writing
 Oral transfer in every case in which a writing is not expressly required by law.

83. Transfer cannot be made otherwise than under this Act :— After this Act comes into force, a transfer of immoveable property within this Act cannot be effected in any manner not prescribed by this Act. Thus, where the Act requires a transfer to be effected only by means of a registered instrument, it cannot be effected in any other manner, *e.g.* by filing a petition to the Collector admitting the transfer, or by an admission recorded in a registered mortgage not being itself the deed of transfer, or by mere mutation of names or change of possession in favour of the transferee—*Immudipattam v. Periya Dorasami*, 24 Mad. 377 (P.C.); *Bishen Lal v. Ghaziuddin*, 23 All. 175. Title to land cannot pass by mere admission where the statute requires a deed. Therefore the mere execution of a *bazidawa* (release or relinquishment) by a benamidar which contains an undertaking not to interfere with the plaintiff's possession cannot itself give or transfer title to the property from the benamidar to the plaintiff (real owner)—*Keshri Mull v. Sukan Ram*, 12 Pat. 616, A.I.R. 1933 Pat. 264 (266).

84. Where writing not necessary :—A *relinquishment* or surrender by a Government ryot to the Government of the properties included in his *patta* is neither a mortgage nor a sale, nor a gift, nor a lease, as defined in this Act and is not by law required to be in writing or in any of the modes prescribed by this Act—*Fowler v. Secretary of State*, 13 L.W. 230, 61 I.C. 852.

A *surrender* of a lease is not a transfer and need not be in writing—*Brojonath v. Maheshwar*, 28 C.L.J. 220, 46 I.C. 100; *Elias Meyer v. Monoranjan*, 22 C.W.N. 441, 44 I.C. 297; *Fowler v. Secretary of State*, *supra*.

A transfer made in compromise of a claim is neither a sale nor a gift nor an exchange, and no writing is necessary under the T. P. Act to validate the same, though such transfer may relate to immoveable property—*Thiruvengada Chariar v. Ranganatha*, 13 M.L.J. 500.

A partition of joint family property is not an exchange and is not by law required to be in writing—*Satya Kumar v. Satya Kripal*, 10 C.L.J. 503, 3 I.C. 247; *Ma Sein Nyun v. Maung U.*, 25 I.C. 498.

The creation of an easement is not a *transfer* thereof, and therefore it can be created by oral agreement, without requiring any writing—*Sital Chandra v. Delanney*, 20 C.W.N. 1158 (1164), 34 I.C. 450.

A grant of immoveable property by way of *gusara*, not being a grant of the corpus, but only of the right to enjoy the usufruct, need not necessarily be in writing—*Gajraj v. Indarpal*, 21 O.C. 360, 49 I.C. 406.

A transfer of land by a husband to be enjoyed by his wife during his life-time in discharge of future maintenance is not a gift or sale and may be made without writing—*Madam Pillai v. Badrakali*, 45 Mad. 612 (F.B.).

85. Where writing is necessary :—Writing is necessary in the case of the following instruments:—

(a) Sale of immoveable property of the value of Rs. 100 or upwards—sec. 54, *infra*.

(b) Sale of a reversion or other intangible thing—*Ibid*.

(c) Simple mortgage irrespective of the amount secured—Sec. 59, *infra*.

(d) All other mortgages securing Rs. 100 or upwards—*Ibid*.

(e) Leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent—Sec. 107, *infra*. But see Sec. 107 proviso, *infra*.; Sec. 117 *infra*.; and Sec. 17 (d) proviso, of Act XVI of 1908 (Registration Act) for exemptions.

(f) Exchange (subject to the same rules as sale)—Sec. 118, *infra*.

(g) Gift of immoveable property—Sec. 123, *infra*.

(h) Transfer of an actionable claim—Sec. 130, *infra*.

(i) Notice of transfer of actionable claim—Sec. 131, *infra*.

10. Where property is transferred subject to a condition or limitation, absolutely restraining the transferee or any person claiming under him from parting with, or disposing of, his, interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan, or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

86. Principle of section :—The rule in this section that a condition in absolute restraint of alienation is void, is founded on the principle of public policy allowing free circulation and disposition of property—*Rosher v. Rosher*, 26 Ch. D. 801; *Renaud v. Guilet*, L.R. 2 P.C. 4; *Faiyaz Husain v. Nilkanth*, 4 O.C. 163. It is a general rule of jurisprudence that where an estate in fee is given, a condition in restraint of alienation is a condition repugnant to the nature of the grant and, as such inoperative. There can be no doubt, on general principles, that when property is transferred absolutely, it must be transferred with all its legal incidents, and that it is not competent to the grantor to sever from the property those incidents which the law inseparably annexes to it, and thereby to abrogate the law by private agreement. The introduction of a condition against alienation in a grant absolute in its terms has been declared to be equivalent to introducing an exception of the very thing which is of the essence of the grant—*Anantha v. Nagamuthu*, 4 Mad. 200 (202).

87. Application of section :—The principle of this section is of universal application and has therefore been applied both to Hindus and Muhammadans—*Krishna v. Shanmuga*, 6 M.H.C.R. 248; *Raja Chunder v. Kooar Gobindanath*, 11 B.L.R. 86 (P.C.); *Tagore v. Tagore*, 9 B.L.R. 377 (P.C.); *Pudmananda v. Hayes*, 28 Cal. 720; *Bhairon v. Parmeshri*, 7 All. 516; *Mahram v. Ajudhi*, 8 All. 452 (459); *Lalijan v. Muhammad Shafi*, 34 All. 478 (480); *Anantha v. Nagamuthu*, 4 Mad. 200; *Muthu Kumara*

v. *Udaya*, 33 Mad. 867. In a recent Oudh case it has been remarked that this section does not apply to cases under the Muhammadan Law—*Hanuman v. Abbas*, 4 Luck. 452, A.I.R. 1929 Oudh 193 (201), 120 I.C. 387.

The principles of this section have been applied to the Punjab although the Act does not apply to that province—*Bhagwan Dei v. Secretary of State*, (1902) P.L.R. page 518; *Nand Singh v. Partab*, 76 I.C. 16, A.I.R. 1924 Lah. 674.

Compromise, family settlement etc.:—A restriction in the power of alienation is void, even though the restriction is contained in a compromise—*Partab v. Nand Singh*, A.I.R. 1924 Lah. 729, 85 I.C. 323. Thus, where one of the terms of a compromise embodied in a decree was that the party to whom a house was conveyed under it was not at liberty to transfer it without the consent and permission of the other party to the compromise and decree, *held* that such a condition was void as being a restraint on alienation, and the house could be transferred in spite of that condition—*Khaiiali Ram v. Raghunath*, 3 A.L.J. 621. Similarly, where upon a compromise in a suit for possession it was agreed that the plaintiff and his heirs who were given possession under the compromise ought not to transfer the property to a stranger, *held* that the condition was void as one in absolute restraint on alienation, and the plaintiff got an absolute estate—*Faiyaz Hussain v. Nilkanth*, 4 O.C. 163. Although this section applies only to cases where the restraint on alienation is annexed to a *transfer* of property, and as such does not apply where the restraint is contained in a compromise by way of family settlement, still a restraint on alienation embodied in a compromise is invalid on general principles of law—*Nageshar v. Mata Prosad*, 25 O.C. 189, A.I.R. 1922 Oudh 236 (244), 69 I.C. 730, affirmed in *Mata Prasad v. Nageshar*, 47 All. 883 (P.C.), A.I.R. 1925 P.C. 272, 91 I.C. 370. In a recent Oudh case, it has been held that since a family settlement is *not a transfer*, it is unnecessary to consider the terms of sec. 10, T. P. Act, or to enter into a discussion as to whether the restriction imposed in the deed of settlement is an absolute or partial restraint on alienation. In a family settlement, every attempt must be made to give effect to the wishes of the parties to the agreement—*Hanuman v. Abbas*, 4 Luck. 452, A.I.R. 1929 Oudh 193 (201), 120 I.C. 387.

Restraint imposed by law:—Restraints on alienation imposed by *statute* are binding upon all persons. There is an essential distinction between restraints on transfers imposed by the Legislature, and restrictions imposed by contract or decree. The general policy of the law, no doubt, is to promote the free alienation and circulation of property and to discourage the introduction of restrictions calculated to interfere with the fulfilment of these objects. But cases may and do arise in which for the protection of particular interests it is deemed expedient by the Legislature to depart from this general principle and to fetter the privilege of free alienations. In such cases, the prohibition against transfer being founded upon considerations of public interests must be treated as absolute—*Wazir Muhammad v. Har Prasad*, 15 O.C. 67, 13 I.C. 613 (615). For instances of such restrictions see clause (i) of sec. 6.

88. Property:—*Life-interest*:—The life-interest of a widow in property given to her for maintenance is just as much property as an absolute interest therein, and any condition annexed to a grant of such an estate absolutely restraining the widow from disposing of that interest, is void under this section—*Ram Chandra v. Gopinath*, 29 I.C. 251.

89. Partial restraint :—This section is confined only to those cases of transfer which are made subject to a limitation *absolutely* restraining the transferee from alienating his interest in the property. Thus, if A transfers his property to B, and imposes a condition that B will never alienate it, the condition is void—*Amiruddaula v. Nateri*, 6 M.H.C.R. 356. But although sec. 10 renders void all conditions which absolutely restrain the transferee from disposing of the property, it is wholly silent as to the validity of *qualified* restraints on alienations. See Mukhopadhyaya's *Law of Perpetuities*, p. 296. A restraint on alienation qualified as to time may be valid—*Chamaru v. Sona*, 14 C.L.J. 303, 16 C.W.N. 99 (102), 11 I.C. 301. A condition restraining the donee from alienating the property to any person outside the family is not invalid—*Muhammad Raza v. Abbas Bandi*, 7 Luck. 257 (P.C.), 36 C.W.N. 774 (783), 137 I.C. 321, A.I.R. 1932 P.C. 158, 9 O.W.N. 577. Where a *patnidar* granted a *darpatni* lease, wherein it was provided that the *darpatnidar* should have full rights to grant leases or create incumbrances subject to the restriction that if the *darpatni* was sold for arrears of rent, the subordinate titles created by the *darpatnidar* should come to an end, *held* that there was no *absolute* restraint on alienation by the *darpatnidar*; the only restriction imposed was that the holder of a derivative title from the *darpatnidar* would be in peril in the event of a sale of the undertenure for arrears of rent. Such a condition is not invalid—*Madhusudan v. Midnapore Zemindary Co., Ltd.*, 45 Cal. 940 (945), 27 C.L.J. 511. Where in a deed of gift the donee promised that he was not to make a transfer (by way of sale, gift or mortgage) of the gifted property without the knowledge, consent and permission of the donor, and that if he did so, he would return the property to the donor, *held* that there was no absolute restraint on the power of alienation, but the promise by the donee was made to the donor personally, and it was only the donor in his life time who could enforce the condition. Further, the case fell within the clear provisions of sec. 126, and the condition was not therefore invalid—*Ma Yin v. Ma Chit*, 7 Rang. 306, 119 I.C. 737, A.I.R. 1929 Rang. 226 (228).

90. Restraint on alienation—Examples :—A restraint on alienation which is absolute in its terms, and extended *over a period of indefinite duration*, is none the less an absolute restraint on alienation within the meaning of this section and is legally invalid. Thus, where a reversioner agreed not to alienate the property during the lifetime of the widow, *held* that the restraint was invalid—*Nageshwar v. Mata Prasad*, 25 O.C. 189, A.I.R. 1922 Oudh 236 (244), 69 I.C. 730. A condition that the donee will not have power to alienate the property during the lifetime of the donor's grandson is invalid—*Lali Jan v. Muhammad Shafi*, 34 All. 478 (480).

Where by a deed of lease executed by a father in favour of his daughter, she was constituted 'malik' in possession by right of mirash talukdhari of several taluks but subject to the condition that neither the grantee nor her heirs should transfer the taluks by gifts except to the extent of 5 pakhis, and that only for a religious purpose, *held* that the words contained in the lease deed conferred an absolute estate on the daughter, and the attempt to restrict the powers of an absolute owner was repugnant to the absolute estate and therefore void—*Sarajubala v. Jyotirmoyee*, 59 Cal. 142 (P.C.), 35 C.W.N. 903 (906), 54 C.L.J. 393, 134 I.C. 648, A.I.R. 1931 P.C. 179. Where property was transferred to a Hindu, and the deed recited that he should enjoy it from generation to generation

but that he should have no power of transferring it in any shape, and that it should not be sold in auction for any debt payable by him, and that any transfer or sale made in violation of such condition should be invalid and should entitle the transferor to claim possession of the property, *held* that the restraints on alienation were against the policy of the law and could not be given effect to—*Bhairon v. Parmesri*, 7 All. 516; *Ashutosh v. Doorga*, 5 Cal. 438 (444) (P.C.). A Mahomedan father during his son's minority gave certain property to him, and, on the delivery of possession, got from him a document stipulating that the latter (son) would not alienate the property. *Held*, that by Muhammadan Law as well as by the general principles of law, such a restriction on alienation, especially after the gift had become complete, is absolutely void—*Amiruddaula v. Nateri*, 6 M.H.C.R. 356. Where the parties to a family partition deed entered into an agreement to the effect that the share of each issueless member should not be alienated but be distributed among the remaining members, *held* that such an agreement was void as repugnant to the right of alienation, which was a legal incident of the absolute estates of severalty created by the partition—*Venkataramanna v. Brahmanna*, 7 M.H.C.R. 345.

Condition to sell the property at a fixed price:—Where a testator devised an estate to his son providing that if the son or his heirs or devisees should desire to sell the estate during the lifetime of the testator's wife, she should have the option to purchase it at a fixed price (which was one-fifth of the real market value of the estate), it was held that the condition to sell at a fixed price much below its real value was equivalent to an absolute restraint on sale, and as such void—*Rosher v. Rosher*, 26 Ch. D. 801. See also *Dolsing v. Khubchand*, cited below.

A condition restraining alienation of the property except to a particular person or persons is void—*Teja Singh v. Moti Singh*, 27 O.C. 350, 1 O.W.N. 423, A.I.R. 1925 Oudh 125; *Muschamp v. Bluet*, 123 E.R. 1253; *In re Mackay*, 20 Eq. 186. Thus a testator gave an estate to A with an injunction never to sell it out of the family, but if sold at all, it must be to one of the brothers hereinafter named. *Held* that the restriction on alienation was inoperative. The introduction of one person's name as the only person to whom the property might be sold rendered the restraint on alienation as complete and perfect as if no person whatever was named, inasmuch as the name of a person who alone was permitted to purchase might be so selected as to render it reasonably certain that he would not buy the property and that the property could not be alienated at all—*Attwater v. Attwater*, 18 Beav. 330. On a sale of certain property the vendee executed on the same day a separate instrument by which he agreed that when he or his heirs should want to transfer the property purchased, he or they should sell it to the vendor or his heirs for the same price which he had paid for it, and to no one else; and that any transfer to any other person would be void. *Held* that as the effect of the agreement was to prevent the transferee from ever transferring his property except at the will of the original vendor or his heirs, and then only if the latter were willing to take it at the time for the fixed price, the agreement in substance amounted to an absolute restraint on alienation and was unenforceable—*Dolsing v. Khub Chand*, 64 I.C. 408, 19 A.L.J. 848; *Nabin Chandra v. Rajani*, 25 C.W.N. 901, 63 I.C. 196 (198); *Asghari Begam v. Maula Baksh*, 1929 A.L.J. 515, A.I.R. 1929 All. 381 (382), 116 I.C. 90.

91. Conditions which are valid—Examples:—Where a Hindu widow

executed an agreement in favour of her husband's cousins in settlement of disputes in respect of her husband's property, by which she agreed not to lease the property without obtaining their signatures, adding that if the document (of lease) be not signed and consented to by both parties it would be null and void, it was held that the agreement being only a qualified restraint on alienation was valid. Sec. 10 did not apply. It is not at all unreasonable that reversioners giving up their claim and allowing a Hindu widow to remain in possession of their property should wish to retain supervision over it and to prevent any act on her part which might cause injury of their reversionary rights—*Kuldip v. Khetrani*, 25 Cal. 869 (871).

A stipulation for pre-emption is not void. Thus, a stipulation in a deed of sale to the effect that in the event of the purchaser selling the property he will give the vendor the first offer, is perfectly valid—*London and S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562. This subject has been fully discussed in Note 107 to section 14 under heading "Personal covenants." A provision reserving a right of pre-emption or pre-mortgage is a valid provision. Thus, a stipulation in a lease deed that should necessities of alienation arise for the lessee (who had permanent rights) the property would be surrendered to the lessor, is valid under this section, and is specifically enforceable against the covenantor and persons claiming under him—*Chethu Kutti v. Kunhunni*, 9 M.L.T. 484, 9 I.C. 171 (173).

92. Restraint on alienation by lessees:—It is permissible for a lessor to fetter the liberty of alienation which the lessee would otherwise possess (and this principle is applicable even to grants of permanent leases)—*Vyankatraya v. Shivram*, 7 Bom. 256 (260); *Subbaraya v. Krishna*, 6 Mad. 159; *Tamaya v. Timapa*, 7 Bom. 262 (265).

A covenant in a lease forbidding transfer by the lessee is valid and enforceable even when the lessee has not transferred the whole of the property leased but reserved a fraction for himself—*Umesh v. Kala Chand*, 34 I.C. 516 (Cal.).

But it should be noted that a mere stipulation in a lease that 'the lessee shall not transfer his interest to any third person and that such transfer should be void' is not valid; in order that such stipulation should be valid under this section it is necessary that such stipulation should be *for the benefit of the lessor, i.e.*, it must be supplemented by a clause that "the lessor shall have a right of re-entry in case of the lessee's breach of the condition against alienation." In other words, if there is a clause in a lease merely stipulating that the lessee should not transfer his interest to any third person, but the lease *does not reserve a right of re-entry*, the clause is inoperative, in as much as it cannot be said to be a condition *for the benefit of the lessor*, and an assignment by the lessee of his interest in the lease would not work a forfeiture of the lease—*Nilmadhab v. Narottam*, 17 Cal. 826; *Netrapal v. Kalyan Das*, 28 All. 400; *Sital Prasad v. Nawab Dildar*, 1 P.L.J. 1; *Mahananda v. Saratmani*, 10 I.C. 374, 14 C.L.J. 585; *Basarat v. Manirulla*, 36 Cal. 745; *Udipi v. Seshamma*, 43 Mad. 503; *Parmeshri v. Vittappa*, 26 Mad. 157; *Tamaya v. Timapa*, 7 Bom. 262 (265); *Madar Saheb v. Sanabawa Gujran Shah*, 21 Bom. 195; *Annada v. Dasarath*, 40 I.C. 444 (Cal.). The landlord's remedy in the case of a breach of such stipulation would be a suit for damages only and not a suit for ejectment—*Sital Prasad v. Nawab Dildar*, 1 P.L.J. 1, 33 I.C. 408; *Tamaya v. Timapa*, 7 Bom. 262. See notes under sec. 111 clause (g).

But where there is no restraint on alienation, a covenant for the benefit of the lessor need not reserve a right of re-entry. Thus, a covenant in a lease that the transferee from the lessee, whoever he may be, will have to pay a *chouth* (one-fourth of the price of the land) to the lessor, and if he does not pay it the transfer would be void, is a valid covenant for the benefit of the lessor and is operative—*Nabjan v. Neburali*, 37 C.W.N. 272 (274), A.I.R. 1933 Cal. 506, 144 I.C. 764 (distinguishing the above cases).

Where a patnidar granted a *darpatni* lease and it was provided that the darpatnidar should have full rights to grant leases and make settlements of lands, but that all such subordinate interests created by the darpatnidar should be extinguished on a sale of the darpatni mahal for arrears of rent, *held* that the provision in the darpatni lease was valid as it was obviously for the benefit of the lessor, since his object was to ensure that the property might fetch full value in the event of a sale for arrears of rent—*Madhusudan v. Midnapore Zemindary Co. Ltd.*, 45 Cal. 940 (946).

93. Involuntary alienations:—A general restriction on assignment does not apply to an assignment by operation of law, taking effect in *invitum*, as a sale under an execution—*Doe v. Carter*, 4 R.R. 586; *Croft v. Lumley*, 27 L.J.Q.B. 32; *Golak Nath v. Mathura Nath*, 20 Cal. 273. Where according to the terms of the lease, the lessee was not competent to transfer his rights under the lease “by sale, gift or any other manner of alienation,” and afterwards the rights of the lessee were *sold in execution* of a decree, *held* that the prohibition in the lease against alienation did not apply to an involuntary alienation (execution sale) and that the execution sale passed a good title to the auction purchaser—*Golak Nath v. Mathura*, 20 Cal. 273; *Nilmadhab v. Narottam*, 17 Cal. 826; *Subbaraya v. Krishna*, 6 Mad. 159; *In re West Hopetown Tea Co.*, 12 All. 192; *Tamaya v. Timapa*, 7 Bom. 262 (265); *Mohendra v. Gagan Chandra*, 78 I.C. 802, A.I.R. 1925 Cal. 471; *Promode Ranjan v. Aswini Kumar*, 18 C.W.N. 1138, 26 I.C. 23.

Where a compromise decree contained a clause that a party to the compromise should have no power to alienate or encumber the property by gift, mortgage or sale, *held* that there was no provision in the compromise restraining *sale in execution* of a decree, and there was nothing to prevent the property from being attached and sold—*Bachumal v. Vessimal*, A.I.R. 1926 Sind 143, 99 I.C. 972.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction,

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction,

Restriction
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Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

Amendment:—The second para. has been amended by sec. 8 of the Transfer of Property Amendment Act (XX of 1929). See Note 98 below. Compare this section with sec. 138, Indian Succession Act, 1925.

Secs. 10 and 11:—The difference between sections 10 and 11 is that while the restriction prohibited by the former section is against the *transfer* of the interest, the restriction referred to in the latter section is against its *free enjoyment*.

94. Principle:—The principle of this section is that an interest created in favour of a person must be absolute, and that limitations directed against the free enjoyment of the property are void. This principle is founded on general principles of policy—*Holman v. Johnson*, 1 Cowp. 543. Any derogation from the completeness of a gift is null, and if the intention to give to the donee the entire subject-matter be clear, subsequent conditions derogating from or limiting the extent of the right are null and void. The gift would be valid but the condition is void—*Lalijan v. Muhammad Shafi*, 34 All. 478 (480), 9 A.L.J. 798, 16 I.C. 105. This section recognises the elementary principle that a transferee of property who takes an absolute interest, as for instance, a donee or a purchaser, cannot be restrained in his enjoyment or disposition of it by any condition inserted in the transfer. Such a condition deprives the property of its legal incidents and is inconsistent with or repugnant to the main purpose of the transfer. It is consequently arbitrary and not enforceable in a Court of law—*Chamaru v. Sona*, 16 C.W.N. 99 (103), 14 C.L.J. 303, 11 I.C. 301. “Notwithstanding the general principle that a donee or legatee can only take what is given him on the terms on which it is given, yet by our law there is a remarkable exception to this general principle. Conditions which are repugnant to the estate to which they are annexed are absolutely void and may consequently be disregarded”—*per* Lindley, L.J. in *Harbin v. Masterman*, (1894) 2 Ch. 184 (196).

The principle of this section applies as much to mortgages or leases as to gifts or sales—*Mahram v. Ajudhia*, 8 All. 452 (459).

95. Restrictions repugnant to interest created:—

(a) *Condition in a sale:*—Where a vendor sold a portion of his property to the vendee by a deed of sale, and on the same date the vendee executed an ikrarnama in which he agreed that he would not collect the rents, that he would never demand partition of that portion, and that he would not alienate or mortgage it or otherwise exercise proprietary rights

over it, *held* that the covenant, by which the proprietary title passed by the sale-deed was cut down to nil and the effect of which was to debar the vendee from enjoying the interest conveyed to him, was not only contrary to public policy but also violated the principles enunciated in sections 10 and 11, and was therefore one which no Court would enforce—*Mahram v. Ajudhia*, 8 All. 452 (455, 456).

(b) *Restriction as regards succession*:—Where an absolute estate is granted, but conditions are imposed that the property should not in any case pass to the heirs of the daughters of the grantee, *held* that the condition is an attempt to alter the legal course of succession to an absolute estate and is void; it does not imply an estate to be determined on the death of the grantee—*Sarajubala v. Jyotirmoyee*, 59 Cal. 142 (P.C.), 35 C.W.N. 903 (906), A.I.R. 1931 P.C. 179, 134 I.C. 648.

(c) *Restraint on partition*:—A condition in restraint of partition is void. Thus, a provision in a will or gift giving property to some persons, but directing that they shall not divide the property for a certain length of time (*e.g.*, twenty years) is void. The donees may proceed to partition at once—*Mokoonda v. Gonesh*, 1 Cal. 104; *Rajendra v. Sham Chand*, 6 Cal. 106; *Raikishori v. Debendranth*, 15 Cal. 409; *Poorendra v. Hemangini*, 36 Cal. 75; *Abu Mahammad v. Kaniz Fizza*, 28 All. 185. Similarly, an agreement among co-sharers of an estate that their property should remain joint is not enforceable. The right of a co-owner to have partition of his share is an incident of the right of ownership, and an agreement not to partition for an indefinite period would be contrary to that right and therefore invalid—*Chandra Sekhar v. Kundan Lal*, 31 All. 3 (4); *Radhanath v. Taruknath*, 3 C.W.N. 126; *Ramalinga v. Birupakshi*, 7 Bom. 538.

(d) *Restraint on alienation for some period*:—Where a Hindu widow by a deed of family settlement transferred the properties inherited from her husband to the latter's reversionary heirs, subject to the condition that they should have no right to transfer any immovable property belonging to the estate during her life-time, *held* that the condition was arbitrary and void as imposing a restraint on a transferee of an absolute interest in property as to the manner in which such interest was to be applied or enjoyed by him, within the meaning of this section—*Chamaru v. Sona*, 16 C.W.N. 99 (103), 14 C.L.J. 303, 11 I.C. 301.

(e) *Condition as regards residence*:—Where an absolute estate is conferred on the grantee, a condition requiring the grantee to reside at a particular place is of no binding effect—*Sarajubala v. Jyotirmoyee*, 59 Cal. 142 (P.C.), 35 C.W.N. 903 (907), A.I.R. 1931 P.C. 179, 134 I.C. 648. Certain lands and a house were given by way of Agrahar gift to a donee and his descendants on condition that he should enjoy the produce of the lands and reside in the house and perform the religious duties, and that in case of the donee abandoning the house or going elsewhere, another person would be substituted in his place. After conforming to the above conditions for some time, the donee went to another place and eventually sold the house and lands. *Held* that the gift was an absolute gift, that the provision as regards residence was only a recommendation and an appeal to religious sentiments; that as a condition it was not valid and enforceable; and that the sale by the donee was valid—*Rukminibai v. Laxmibai*, 44 Bom. 304 (313), 22 Bom.L.R. 254, 56 I.C. 361.

(f) *A condition postponing enjoyment* of the property is void. Where a testator intends to make a present gift of his property to his son (a

major) but he intends also that his son should have the ultimate enjoyment of the whole estate in the hands of the trustee after the payment of the legacies, the deprivation of the son of the present enjoyment of the estate and the attempted restriction therein are invalid and must be disregarded—*Lloyd v. Webb*, 24 Cal. 44 (52).

96. Restrictions contained in a decree:—A condition in restraint of alienation of an absolute estate, though it is *contained in a decree* of the Settlement Court, is void, and such a decree conveys an absolute estate—*Lal Sripat v. Lal Basant Singh*, 1 O.L.J. 421, 25 I.C. 743.

97. Restrictions which are valid:—Where an intention to make an absolute transfer *in praesenti* of all proprietary right is clear, any condition which derogates from the *immediate* completeness of the gift is regarded as void. But where the condition may be given effect to without in any way detracting from the immediate completeness of the gift or rather the immediate transfer of the right in the substance of the gift, the condition as well as the gift is valid. Thus, any reservation of the proprietary rights in the *corpus* would be inconsistent with an intention to make a gift, but the reservation of a right to the *usufruct of a portion* of the property given would not be inconsistent, if the intention to give the corpus be otherwise manifest—*Fakhir Jahan Begam v. Abdul Ghani*, 5 O.L.J. 49, 45 I.C. 307. If a man was to give a piece of land to another on condition that the latter should give to the former the *whole* of the produce of the land in perpetuity, the condition would be bad. But it is otherwise with a gift by A to B subject to the condition that B should pay periodically to A a *part of the usufruct* of the property; in such a case both the gift and the condition would be valid. The reason is obvious, for the reservation of an interest by the donor for himself and his heirs does not interfere with the right of property vesting in the transferee by the act of transfer—*Lali Jan v. Md. Shafi*, 34 All. 478 (480). If a Muhammadan woman gives a property to her son and provides that the donee shall be the absolute owner of half the property with all the powers of an owner, and with regard to the other half he shall also be the owner but must give the income of this portion for the maintenance of the minor grandson of the donor, *held* that the condition as to the payment of income of one-half of the property for the maintenance of the donor's grandson is valid—*Lali Jan v. Md. Shafi*, *supra*.

This section applies where on a transfer of property an interest therein is created *absolutely* in favour of any person, but it does not apply where a gift is made not of *full proprietary* right but only of *usufruct* of land for purposes of maintenance. Thus, certain land was granted to the donees for maintenance without any power of transfer and the deed authorised the grantees to cultivate the land and to appropriate the usufruct thereof but enjoined that if they wanted to transfer their rights they must do so to the grantor or his descendants. *Held* that the deed was not a gift of absolute right, but only of usufruct for maintenance, and this section did not apply, and therefore the conditions in restraint of alienation were valid, as they formed an essential part of the grant itself—*Jugdeo v. Jwala Prosad*, 15 O.C. 345, 15 I.C. 244.

Where a house was conveyed to the transferee subject to a covenant on his part not to use it for any purpose other than a private residence, and the transferee conveyed it to another who converted it into a boarding house, *held* that the covenant not to use the house for any other purpose

was not repugnant to the nature of the estate and might be enforced by an injunction—*Hobson v. Tulloch*, (1898) 1 Ch. 424.

98. Second para:—The wording of the second para. has been changed, but the law has not been altered.

The *Special Committee* (1927) observes:—"Sections 11 and 40 of the Act refer to affirmative and negative covenants in a transfer. Section 11 refers to rights as between a transferor and a transferee, while section 40 relates to the rights of third parties against transferees. The words 'to compel its enjoyment,' used in the second paragraph of section 11 and in the first paragraph of section 40, indicate that affirmative covenants for the beneficial enjoyment of one piece of the property of which the other piece has been transferred can in all cases be enforced. This paragraph seems to have been based on the observations of Lord Cottenham in *Tulk v. Moxhay*, 2 Ph. 774, a case decided in 1848. But in later English decisions, such as *Haywood v. Brunswick Building Society* (8 Q.B.D. 403), the observations in Tulk's case were not approved, and it is now settled that except in certain special cases affirmative covenants cannot be specifically enforced. Thus, in *Austerberry v. Corporation of Oldham*, (1885) 29 Ch. D. 750, a covenant to spend money on the land was held as not binding on the purchaser of the land, although he had notice of the same. Indian Courts have followed the same principle (27 Bom.L.R. 73). We propose that the second paragraph of section 11 and the first paragraph of section 40 should be so amended as to make it clear that, although an affirmative covenant is not by itself invalid as between a transferor and transferee (section 11), negative or restrictive covenants only can be specifically enforced against a third person (section 40)." See Note 177 under sec. 40.

The most common instance of the rule embodied in this para. is to be found in those cases where a person who owns a house and an adjoining land and sells the land, enters into a covenant with the purchaser that the latter shall keep a portion of the land transferred vacant and free from buildings, so as not to obstruct the air and light of the vendor's house. Such a covenant, being one intended for the *beneficial enjoyment* of the vendor's house, is enforceable as against the purchaser. See *Tulk v. Moxhay*, 2 Phill. 774; *McLean v. McKay*, L.R. 5 P.C. 327. A covenant which is not made for the beneficial enjoyment of the transferor's property, but is merely an arbitrary condition imposed for its own sake is not enforceable against the transferee, and the latter may ignore it; e.g., covenant to use the transferred land as a garden (*Tulk v. Moxhay*, supra), covenant to build a second storey, covenant to improve the transferred land (*Haywood's case*, supra), etc. Moreover, these are affirmative covenants which can be rarely enforced against the transferee.

12. When property is transferred subject to a condition or limitation, making any interest therein reserved or given to or for the benefit of any person to cease on his becoming insolvent or endeavouring to transfer or dispose

Condition making interest determinable on insolvency or attempted alienation.

of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

99. Principle:—This section is an exception to the general principle embodied in sections 31 and 32 which provide that an interest may be created with the condition superadded that it shall cease to exist on the happening of an uncertain event. The plain meaning of this section is this: A condition attached to a grant that the grantee shall cease to have any right on becoming insolvent or on attempting to alienate the property is void, and the grantee takes the entire estate as if that condition had not been attached. The reason is, that it is manifestly unjust that the grantee should enjoy and possess all the *indicia* of absolute dominion over the property, and yet be deprived of the right of alienation incident to such ownership; and it is equally unjust that creditors who may have made advances on the strength of the property should be deprived of its security on account of a clause in the transfer, which none but the grantor and the grantee may know anything about. Under this section, if the grant is subject to such a condition, it will be void and the property will pass to the Official Assignee in case of insolvency, or to the alienee in case of voluntary alienation.

The assumption of membership of an Association (Shares and Stock Brokers' Association) does not involve the "transfer" of any property on any condition whatever, within the meaning of this section—*Official Assignee v. Shroff*, 56 Bom. 374 (P.C.), 36 C.W.N. 909 (917), 137 I.C. 776, A.I.R. 1932 P.C. 186.

Where the rules of a Provident Fund provided that if a member transferred in whatever manner his share or interest therein or part thereof, then and thereby such interest or right would be extinguished, *held* that the condition was invalid under this section—*Re O'Brien*, 60 Cal. 926, 37 C.W.N. 1050 (1053), A.I.R. 1933 Cal. 701.

100. Lease:—The principle enunciated in this section is made subject to an exception in the case of a lease. A restraint as regards alienation will be void where property is granted in absolute right (see section 10); but where land is merely granted for use or cultivation either free of rent or at a favourable rate of rent, any condition restraining alienation would not be inconsistent with the rights conferred. Hereditary rent-free tenancies of a perpetual character may exist without any right of alienation attaching to them—*Katesar v. Mahomed Amir*, 5 O.L.J. 149, 46 I.C. 73.

A lease which was permanent, heritable and transferable contained a covenant to the effect that the tenant would, if he transferred the property, pay to the landlord out of the purchase-money in his hands one-fourth as *nazar* and would obtain registration of the name of the transferee; the covenant further provided that if this step was not taken the transfer would be invalid and the tenant would continue to be liable for the rent. *Held* that the provisions of sections 10 and 12 made it abundantly clear that a restrictive covenant of this description is valid when inserted in a lease between a landlord and his tenant—*Saradakripa v. Bepin Chandra*, 37 C.L.J. 538, A.I.R. 1923 Cal. 679 (680), 74 I.C. 555.

"*For the benefit of the Lessor*":—For the meaning of these words, see Note 92 under sec. 10.

These words show that if a lease contains a condition that on the lessee becoming insolvent the lease shall determine, the condition is valid. By English law, a clause in a lease is valid which gives a right of re-entry by the landlord in case the term be taken in execution, or in the event

of the lessee becoming insolvent or judgment being entered up or *fiere facias* being sued out against him, and the above rule as regards the insolvency of the lessee is expressly adopted by the concluding words of sec. 12, Transfer of Property Act—*Vyankatraya v. Shivrambhat*, 7 Bom. 256 (261). Section 111, clause (g) (3) now contains a provision (recently added by the Amendment Act of 1929) that if the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of that event, the lease is determined by forfeiture. See Note 599A under sec. 111.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property.

Transfer for benefit of unborn person.

Illustration.

A transfers property, of which he is the owner, to B, in trust for A and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death, for A's second son. The interest so created for the benefit of the eldest son does not take effect because it does not extend to the whole of A's remaining interest in the property.

Analogous Law:—This section may be compared with section 113 of the Indian Succession Act, 1925.

101. Scope:—The rule laid down in this section is applicable to *moveable* as well as *immoveable* property—*Cowasji v. Rustomji*, 20 Bom. 511.

Although a condition subsequent may be inoperative under this section, still it will not invalidate the prior interest; see section 30. Thus, in the illustration, the disposition in favour of A's unborn son for life is inoperative, but the trust will take effect.

102. 'Not in existence':—A child *en ventre sa mere* is considered to be in existence—*In re Wilmer's Trusts*, [1903] 2 Ch. 411.

14. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity.

This section may be compared with section 114 of the Indian Succession Act, 1925. The two illustrations to that section are cited below as elucidating the meaning of the section:—

"Illustration (a):—A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of the sons of B

as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B, and the minority of the sons of B. The bequest after B's death is void.

Illustration (b):—A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25. B dies in the life-time of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid."

104. Perpetuities:—"The chief inducements to the creation of perpetuities are the desire of preventing prodigality in our descendants, the desire of ruling after death, and last but not least, family pride, joined to that agreeable illusion which paints the successive existence of our descendants as the prolongation of our own"—Mukhopadhyay's *Law of Perpetuities*, p. 17.

But it is the policy of the law to discountenance the creation of perpetuities. Property cannot be tied up longer than for a life in being and twenty-one years (in England) after. This is called the rule against perpetuities—*per* Jessel, M.R., in *In re Ridley*, (1879) 11 Ch. D. 645. "The necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in or dominion over property will be obvious if we consider, for a moment, what would be the state of a community in which a considerable portion of the land and capital was locked up. The free and active circulation of property which is one of the springs as well as the consequences of commerce would be obstructed; the capital of the country withdrawn from trade; and the incentives to exertion in every branch of industry diminished. Indeed such a state of things would be utterly inconsistent with national prosperity; and those restrictions which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptional motives, would be baneful to all."—Jarman on *Wills* (4th Ed.), pp. 250, 251.

English and Indian law compared:—According to the English law, the vesting of property might be postponed for any number of lives in being and an additional term of 21 years afterwards, and for as many months in addition as are equal to the ordinary period of gestation, should gestation exist (*Jee v. Audley*, 1 Cox. 324); and the additional term of 21 years might be independent or not of the minority of any person to be entitled (*i.e.*, irrespective of the fact whether such person is a minor or not). Indian law, however, allows the vesting to be delayed beyond the lifetime of persons in being, for the period only of the minority of some person born in their lifetime; the addition of an *absolute period* of 21 years has not been adopted by this section. So, whereas under the English law the additional period allowed after lives in being is a term of twenty-one years *in gross*, without reference to the infancy of any person, under the Indian Statutes the term is the *period of minority* of the person to whom, if he attains full age, the thing bequeathed is to belong—at 21, if he has a guardian appointed by the Court, at 18 in other cases—Mukhopadhyaya's *Law of Perpetuities*, p. 99,

Test to determine whether a covenant falls within the rule:—In order to determine whether a particular covenant in a sale-deed offends the rule against perpetuity, the test is whether the covenant is such that the vesting of property in the vendee *might have* been postponed beyond the period laid down in sec. 14. The test is not whether in the particular case the vesting *actually took place* within the lives in being and 18 years after. If the covenant in the sale deed was such that the property *might have* remained in the possession of the vendor for 100 or 200 years, it offended against the rule of perpetuities, and was consequently invalid and unenforceable; and the fact that in the particular case the period within which the property came to the hands of the vendee actually happened to fall within the legal limitation did not take the case out of the mischief of the rule—*Ram Newaz v. Nankoo*, A.I.R. 1926 All. 283, 92 I.C. 401. To test whether a covenant violates the rule against perpetuities, the Court must look not to the particular events which have actually happened but to all possible contingencies—*Rajaramji v. Ramnath*, A.I.R. 1927 Pat. 412, 105 I.C. 54, 9 P.L.T. 17; *Pan Kuer v. Ram Narain*, 10 P.L.T. 217, A.I.R. 1929 Pat. 353 (357), 117 I.C. 33; *Kala Chand v. Jatindra*, 56 Cal. 487, 33 C.W.N. 150 (156); *Nabin v. Rajani*, 25 C.W.N. 901 (904), 63 I.C. 196; *Bramamoyi v. Jogesh*, 8 B.L.R. 400 (407); *Soudaminey v. Jogesh*, 2 Cal. 262 (268); *Dungannon v. Smith* (1845) 12 Cl. & F. 546; *Jee v. Audley*, (1787) 1 Cox. 324.

105. Hindu and Mahomedan Law:—The rule contained in this section applies to Hindus; see *Krishnaramani v. Ananda*, 4 B.L.R. (O.C.) 231; *Anantha v. Nagamuthu*, 4 Mad. 200; *Surjeemonee v. Denobundhu*, 6 M.I.A. 555; *Kolathu v. Ranga*, 38 Mad. 114. "A Hindu cannot by will or gift divest succession permanently. A private individual who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate and the gift must fail and the inheritance takes place as the law directs"—*Mayne's Hindu Law*.

The rule against perpetuity is also applicable to Mahomedans. See *Yusufkhan v. Misal Khan*, 73 I.C. 99.

106. Scope of Section:—The rule against perpetuity laid down in this section relates to any property, whatever be its nature and whether it is *moveable* or *immoveable*—*Cowasji v. Rustomji*, 20 Bom. 511.

The rule of perpetuities applies when there is a *transfer* of an interest; it cannot apply where only a *charge* is created which does not amount to transfer of any interest—*Mattub Hasan v. Kalawati*, A.I.R. 1933 All. 934 (937).

Gifts to charities do not fall within the rule. See sec. 17 (now 18). But a perpetuity cannot be created in favour of an individual under the cloak of an illusory gift to a charity—*Mukhopadhyaya's Perpetuities*, p. 136.

107. Personal covenants:—The rule against perpetuity applies when an *interest in property* is created, and has no application to *personal contracts*. "It is settled beyond argument that an agreement merely personal not creating any interest in land is not within the rule against perpetuities"—*South Eastern Railway v. Associated Portland Cement Manufacturers Limited*, [1910] 1 Ch. 12 (33). A covenant to do any act (*e.g.*, to pay money) is not void for the reason that the time for the performance of the act does not fall within the period allowed by this rule—*Walsh v. Secretary of State*, 10 H.L.C. 367. "Whether the rule as to remoteness applies or not depends upon this—does or does not the

covenant give an interest in the land? If it is a bare or mere personal covenant, it is of course not obnoxious to the rule against perpetuity"—*per* Jessel M.R. in *London & S. W. Ry. Co v. Gomm*, (1882) 20 Ch. D. 562 (580). A personal contract to convey land is not affected by the rule against perpetuities—*Dahya Bhai v. Maharaj Bahadur*, 1 P.L.J. 238 (244, 251), 34 I.C. 482. An agreement to sell or reconvey land is an agreement merely personal, not creating an interest in land (see the last para of section 54 of this Act) though it has reference to land. Such an agreement does not offend the rule against perpetuities—*Charamudi v. Raghavalu*, 39 Mad. 462 (469, 472), *Ramasami v. Chinnan*, 24 Mad. 449 (469); *Munusami v. Sagalaguna*, 49 Mad. 387, A.I.R. 1926 Mad. 699, 100 I.C. 399, 51 M.L.J. 229; *Harkishandas v. Bai Dhanu*, 50 Bom. 566, 28 Bom. L.R. 954, 98 I.C. 634, A.I.R. 1926 Bom. 497. (Moreover such a contract does not amount to a *transfer* within the meaning of this section read with sec. 5, as there is no conveyance of any property in present or in future—*Harkishandas v. Bai Dhanu*, *supra*). An agreement to sell immoveable property by which the vendor agrees to convey the same whenever the vendee pays the purchase-money, is valid and enforceable and not void as offending against the rule of perpetuities—*Raja of Karvetnagar v. Velayuda*, 18 M.L.T. 83, 29 I.C. 435 (436). A covenant of pre-emption is a purely personal covenant, and does not create any interest in immoveable property. Consequently it cannot offend the rule against perpetuities—*Basdeo v. Jhugru*, 46 All. 333 (338, 343), A.I.R. 1924 All. 400, 83 I.C. 390, 22 A.L.J. 265; *Aulad Ali v. Syed Ali*, 49 All. 527 (F.B.), 25 A.L.J. 289, 100 I.C. 683, A.I.R. 1927 All. 170 (overruling *Gopi Ram v. Jeot Ram*, 45 All. 478, and *Balli Singh v. Raghubar*, 45 All. 492); *Muhammad Jan v. Fazaluddin*, 46 All. 514 (*per* Lindsay J.; Sulaiman J. *contra*). Moreover, when a contract of pre-emption is entered into there is no '*transfer* of any property' at all, and sec. 14 cannot in terms apply to it—*Basdeo v. Jhugru*, 46 All. 333 (341); *Aulad Ali v. Syed Ali* (*supra*).

Covenants running with the land:—From the above cases it is evident that a distinction should be drawn between a *personal* covenant (which binds only the parties themselves, but not their heirs or assignees) and *covenants running with the land* (covenants creating an interest in the land) which are binding not only on the parties to the covenant but *also on their heirs and assignees*. The rule against perpetuity is not obnoxious to the former but invalidates the latter, because, where the covenantor binds not only himself but his heirs and successors, the time for performance of the covenant may extend beyond the statutory limit of time fixed by sec. 14 of the Transfer of Property Act. The leading case on this subject is *London and South Western Ry. Co v. Gomm*, (1882) 20 Ch. D. 562. In this case a Railway company had sold land with an agreement by their vendee on behalf of himself as well as "his heirs, assigns and owners for the time being of the land, and all other persons who should or might be interested therein," and the agreement contained an option to the Railway company to repurchase at any time. It was held that the covenant for repurchase, creating an interest in the land in perpetuity without any definite limit as to the period of time within which the covenant was to have effect, could not be enforced. A covenant of pre-emption the operation of which is *not meant to extend beyond a lifetime*, does not violate the rule against perpetuities. Thus, there was a covenant between a mortgagor and mortgagee, who had a right to redeem the property at

any time after nine years, to the effect that the mortgagee would have a right of pre-emption in respect of the sale of the mortgaged property, and the language clearly indicated that the covenant was between the mortgagor and the mortgagee only, and there was nothing to suggest that the heirs of the parties were meant to be bound by the covenant. *Held* that there was no violation of the rule against perpetuity—*Matura Subba Rao v. Surendra*, 8 Pat. 243, A.I.R. 1928 Pat. 637, 113 I.C. 106. But a covenant for pre-emption which is unlimited in point of time, which binds not only the parties themselves, but their heirs and representatives also, is void on the ground that it is obnoxious to the rule against perpetuities—*Nabin Chandra v. Rajani*, 25 C.W.N. 901 (904), 63 I.C. 196 (198), A.I.R. 1921 Cal. 162; *Kala Chand v. Jatindra*, 56 Cal. 487, 33 C.W.N. 150 (157), A.I.R. 1929 Cal. 263; *Nabin Chandra v. Nawab Ali*, 5 C.W.N. 343; *Rash Behari v. Shabharanjan*, 64 I.C. 1001 (Cal.); *Rajaramji v. Ramnath*, 9 P.L.T. 17, 105 I.C. 54, A.I.R. 1927 Pat. 412; *Dinkarrao v. Narayan*, 47 Bom. 191 (208); *Kolathu v. Ranga*, 38 Mad. 114; *Ramasami v. Chinnan*, 24 Mad. 449 (467). So also, where the grant of an absolute estate is followed by a defeasance clause which provides that if the persons designated as the heirs of the grantee (*viz.*, the grantee's sons and their male descendants and the grantee's daughters) cease to exist, the property will revert to the grantor or his heirs, *held* that the event which is referred to in the defeasance clause, is an indefinite failure of the male issue of the grantee, and the attempted gift over mentioned in the clause is therefore void—*Sarajubala v. Jyotirmoyee*, 59 Cal. 142 (P.C.), 35 C.W.N. 903 (907), A.I.R. 1931 P.C. 179, 134 I.C. 648. An indemnity bond making certain property permanently liable to the purchaser and his assignee as security in case the purchaser is deprived of the possession of the property sold to him has been held to be unenforceable as violating the rule against perpetuities—*Natesa v. Gopalasami*, 51 Mad. 688, 55 M.L.J. 151, A.I.R. 1928 Mad. 894 (896), 110 I.C. 830.

A covenant ran as follows:—"If the Sitambari Jain Society shall require any place on Pareshnath hill for erecting *mandir* or *dharamsala*, in that case I and my heirs shall give to the Society land, stones, and timber from the hill free of cost for the purpose of making the *mandir* or *dharamsala*, and if I and my heirs refuse to give, the Sitambari Jain Society shall take the same of its own power." *Held* by the Patna High Court that if the covenant could in any way be construed to create an interest in the land it was affected by the rule against perpetuities, inasmuch as it created a future interest which might possibly vest after an *indefinite* period, and as by the existence of such an interest the owner was prevented from alienating his estate discharged of it before the happening of the condition, and that event might possibly never occur; but if the covenant was viewed as merely a personal contract to convey land, it was not obnoxious to the rule against perpetuities—*Dahyabhai v. Maharaj Bahadur*, 1 P.L.J. 238 (249, 251) 34 I.C. 482; on appeal the Privy Council held that the agreement was one to grant in the future whatever land might be selected as a building site and therefore it created an interest in land, and as the interest created would be one to take effect by entry at a later date and as this date was *uncertain*, the covenant offended against the rule of perpetuity and could not be given effect to—*Maharaj Bahadur v. Balchand*, 6 P.L.J. 163 (166), 2 P.L.T. 131, 25 C.W.N. 770 (P.C.), A.I.R. 1922 P.C. 165, 61 I.C. 702.

By an agreement between the shebais of a thakur and a family of Chatterjees, the latter were appointed pujaris, and some land was placed in their possession in order that the income might be applied for maintenance of the sheba, and it was stipulated that the Chatterjees should be pujaris from generation to generation but in case they were found guilty of misconduct or negligence they were to forfeit their office of pujaris. *Held* that as no interest in land was created in favour of the pujaris, the agreement was a personal contract which was not affected by the rule against perpetuities, and that as soon as the pujaris were disqualified for their office by reason of their misconduct, they were disentitled to retain possession of the land—*Nafar Chandra v. Kailash Chandra*, 25 C.W.N. 201, 62 I.C. 510 (512).

108. Covenant of redemption in mortgage:—The rule against perpetuity applies only to cases where there is a new interest in immovable property contemplated to be created after the expiry of the period fixed by the rule. In the case of a mortgage, however, there is no such future interest in property contemplated to be created, because it is of the very essence of the mortgage that the equity of redemption is a present interest in property in exercise of which alone the property is sought to be redeemed. Therefore a clause in a mortgage to the effect that “whenever the party likes he has the right to redeem” does not offend the rule against perpetuity—*Padmanabha v. Sitaram*, 54 M.L.J. 96, A.I.R. 1928 Mad. 28 (33), 106 I.C. 158.

Covenants in leases:—The rule does not apply to contracts for perpetual renewal of leases—Mukhopadhyaya’s *Law of Perpetuities*, p. 104. Where in a deed of mining lease for 5 years the lessor covenanted: “I bind myself to give you such leases as you may require from time to time after the expiration of this agreement, on the same condition. Should I fail to do so, I bind myself to pay you all your expenses that you may incur.” *Held* that the clause for renewal did not amount to a *transfer*, and therefore it did not offend the rule against perpetuity and was not rendered inoperative by this section—*Pichu Naidu v. Jefferson*, 44 Mad. 230, 60 I.C. 591. But where on the creation of a permanent lease the lessee covenants that if he or his representative intends to *transfer* the whole or a portion of the leasehold interest, the transfer would be made in favour of the lessor for proper price or to third parties only with the permission of the lessor, and that any transfer in contravention of this covenant would be invalid, *held* that the covenant is void as offending the rule against perpetuities—*Swarna Kumar v. Prohlad Chandra*, 26 C.W.N. 874, A.I.R. 1922 Cal. 474 (475), 67 I.C. 719.

A clause entitling the lessor to terminate the lease at any time is not bad for remoteness. It is open to the lessor to contract with the lessee that the land should be available for him whenever he requires it—*A. Rama Rao v. Thimmappa*, 48 M.L.J. 463, A.I.R. 1925 Mad. 732, 87 I.C. 433. Where the proprietor of certain lands created a patni lease with a condition that the patnidar should give back to the lessor such lands as might be required by the lessor, *held* that as no *interest in land* was created in favour of the lessor by the covenant in the lease, but rights were merely reserved to the lessor, the covenant did not offend against the rule of perpetuities. The rule against perpetuities is directed against the creation of *interests in land* which will not have effect within a certain period—*Jogesh Chandra v. Asaba*, 44 C.L.J. 220, A.I.R. 1927 Cal. 41, 98 I.C. 46.

109. "Person in existence":—A child *en ventre sa mere* is considered to be in existence—*In re Wilmer's Trusts*, [1903] 2 Ch. 411. A child adopted after a man's death in pursuance of a power given by him is in contemplation of law begotten by that man—*Tagore v. Tagore*, 9 B.L.R. 377 (P.C.).

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails as regards the whole class.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails *in regard to those persons only and not in regard to the whole class*.

Amendment:—This section has been amended by sec. 9 of the T. P. Amendment Act (XX of 1929). For reasons, see Note 112 below.

110. Principle of old section:—The old section was based on *Leake v. Robinson*, 2 Mer. 363. The principle of the old section was that a gift to a class which was void as to any member of that class, by reason of being too remote, must fail altogether. Therefore, if a bequest was made to a class of persons, in such a manner that with respect to some of the members of it, it was too remote, by reason of the interest not vesting within the legal limits during which a bequest might take effect, the whole gift failed, notwithstanding that with respect to other members of that class it might not be too remote—Williams on *Executors*, 11th Ed., Vol. II, p. 998. And so Grant M.R. observed in *Leake v. Robinson*, 2 Mer. 363 (390): "The bequest in question is not made to individuals but to classes, and what I have to determine is whether the *class* can take. I must make a new will for the testator if I split into portions his general bequest to a class, and say that because the rule of law forbids his intention from operating in favour of the whole class I will make his bequest what he never intended them to be, namely, a series of particular legacies to particular individuals." In *Pearks v. Moseley*, L.R. 5 App. Cas. 714, it is stated:—"The rule is that the vice of remoteness affects the class as a whole, if it affects an unascertained number of the members."

112. Old section criticised in the light of Hindu law:—The rule in *Leake v. Robinson*, on which the old section was based, has, except in a few early Calcutta cases, never been followed in India. The principle that a gift which fails as regards some members of a class, fails as regards the whole class, may be applicable to England, a country in which the nearest relatives are separate in property, in residence and in all the details of life; one brother is no more affected by a gift to another brother than by a gift to a stranger, and there is all the difference in the world between a gift to all the members of a class and a gift to some of them. But with Hindus, the joint family state is the normal state; separate property is the exception. Even where individual members of a family have separate property, they

may and generally do continue to live together joint in food and worship and enjoyment of property. To such a people, the principle of *Leake v. Robinson* ought not to be applied—*Ramlal v. Kanailal*, 12 Cal. 663 (683). In this case Wilson, J., pointed out that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. "Rules of construction are rules designed to assist in ascertaining intention; and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and it is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question."—*Ibid* (at p. 676). In the case of Hindus, when a gift is made to a class of persons consisting of children or descendants, some of whom cannot take, the testator may be considered to have a primary and a secondary intention. His primary intention is that all members of the class shall take, and his secondary intention is that if all cannot take, those who can shall do so, the true rule being that those members of the class take, who are at the testator's death capable of taking. Where it appeared from the whole of a will executed by a Hindu testator that his primary intention was that all his nephews then born and those who might be born afterwards should take equally under a bequest made by him, and his secondary intention was that his nephews who were in existence should take, though not specifically named, and where the primary intention could not be given effect to because the bequest was bad in respect of those who might be born subsequently, the Court would carry out the secondary intention and give effect to the bequest as regards the nephews who were competent to take—*Bhagabati v. Kalicharan*, 32 Cal. 992 F.B. (following *In re Coleman*, 4 Ch. D. 165); affirmed by the Privy Council in 38 Cal. 468 (P.C.); *Radha Prasad v. Ranimoni*, 41 Cal. 1007 (P.C.); *Khimji v. Morarji*, 22 Bom. 533; *Ranganadha v. Bhagirathi*, 29 Mad. 412; *Tribhuvandas v. Rattanji*, 18 Bom. 7; *Rai Bishen Chand v. Asmaida*, 6 All. 560 (P.C.); *Advocate-General v. Karmali*, 29 Bom. 150. As a general rule, where there is a gift to a class, some of whom are or may be incapacitated from taking, because not born at the date of the gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking—*Ram Lal v. Kanai Lal*, 12 Cal. 663 (685). If there is a person in existence at the time of gift capable of taking, whom the donor undoubtedly means to benefit, he is entitled to take, although others of the same class subsequently come into existence whom the donor meant also to benefit, but who cannot take because of their non-existence at the date of the gift—*Tribhuvandas v. Rattanji*, 18 Bom. 7. Where the primary intention of the testator was that all the members of a specified class should take, and his secondary intention was that if all could not take such of them as could ought to take it, the bequest was held to be valid—*Mangal Das v. Tribhuvandas*, 15 Bom. 652. Under the Hindu law the presumption is always made that the testator had intended that his wishes should take effect rather than they should be defeated altogether—*Ibid*. A gift to a class of persons, some of whom are unborn, will take effect in favour of those who are in existence, unless it appears clearly to the Court that the grantor intended

that the class, and not some individuals among them, should be benefited—*Gordhandas v. Bai Ram Coovar*, 26 Bom. 449.

New section—Object of amendment:—The *Special Committee* (1927) observes:—

“Section 15 of the Transfer of Property Act deals with a gift to a class. It reproduces with slight verbal alterations the provisions of section 102 of the Indian Succession Act, 1865 (now section 115 of the Indian Succession Act, 1925), which was enacted on the principle of the decision in *Leake v. Robinson*, (1817) 2 Mer. 363. The principle is thus stated in *Theobald on Wills*:—

‘Where there is a gift to a class, any members of which may have to be ascertained beyond the limits of perpetuity—for instance, to the children of a living person who shall attain twenty-five—the whole gift is void.’

“It will be observed that the rule applies only to gifts to a class which offend the rule against perpetuities.

“Prior to certain special Acts, to be presently noted, Hindu Law did not permit a gift in favour of a person who was not in existence at the date of the gift, or a bequest in favour of a person who was not in existence at the death of the testator (*Tagore v. Tagore*, 9 Beng.L.R. 377, 397, 400) on the ground that a person capable of taking must be in existence at the material date. Difficulties, however, arose where a gift was made to a class of persons of whom some were and some were not in existence at the date of the gift. The leading case on the subject is that of *Rai Bishen Chand v. Mussumat Asmaida Koer*, (1884) 11 I.A. 164, 6 All. 560, wherein a Hindu made a gift of his property to his grandson S who was then in existence “and his (S’s) brothers who may be born thereafter.” It was argued on the strength of the rule in *Leake v. Robinson* and the analogy of section 102 of the Indian Succession Act, 1865, that as the gift to the unborn grandson was invalid according to the Hindu law, no benefit could be taken even by the grandson who was in existence at the date of the gift. But this contention was overruled by the Judicial Committee. As to section 102, it was observed that it did not apply to the facts of the case, because the gift to the unborn grandsons did not fail by reason of the rules contained in section 100 or section 101, but by reason of the *personal incapacity* of the unborn grandsons to take.

“The true scope of the rule in *Leake v. Robinson* was pointed out by Sir Lawrence Jenkins in *Radha Prasad v. Ranimoni Dasi* (1911) 38 Cal. 188 (affirmed in 41 I.A. 176, 41 Cal. 1007). Dealing with that rule the learned Judge said at page 199:

‘On behalf of *Ranimoni* it is contended that as some of the class cannot take, the whole gift is void and in support of this *Leake v. Robinson* has been cited. But this contention proceeds on a misapplication of this case and a misconception of the true nature of a gift to a class. In *Leake v. Robinson* the gift to the class failed because the class could not be ascertained within the period allowed by the rule against perpetuities. The gift herein nowhere offends that rule: its only fault is that the class of legatees includes some who were not in existence at the date of the testator’s death and were thus under a *personal incapacity*. And the difference is obvious. In a gift to a class the testator looks to the body as a whole rather than to the members constituting that

body [*Kingsbury v. Walter* (1901) A.C. 187, 191], and the class is in a sense personified. But if that class cannot be ascertained until a time beyond that permitted by the rule against perpetuity, there is no class to which the gift can legally be made. But if, as here, the fault is not that a class cannot be ascertained within the period permitted by law, but that certain members of the class are *incapable of taking*, different considerations apply.'

"The whole question of gifts to a class was gone into at considerable length by Wilson, J., in *Ram Lal Sett v. Kanai Lal Sett* (1886) 12 Cal. 663. In that case the learned Judge showed that the rule in *Leake v. Robinson* was introduced into India owing to a mistaken analogy and at the end of the judgment he stated that he should be prepared to hold as a general rule that where there is a gift to a class, some of whom are or may be incapacitated from taking, because not born at the date of gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking.

"The judgment of Wilson, J., was referred to by their Lordships of the Privy Council in *Bhagabati v. Kali Charan* (1911) 38 I.A. 54, 38 Cal. 468, at some length, and their Lordships expressed their entire concurrence in the judgment.

"The rule that a Hindu could not dispose of his property by gift or sale in favour of an unborn person fettered the free disposition of property. To remove this disability three Acts were passed, namely, (1) Madras Hindu Transfers and Bequests Act, I of 1914, (2) the Hindu Disposition of Property Act, XV of 1916, and (3) Hindu Transfers and Bequests (City of Madras) Act VIII of 1921. * * * It is declared by all the three Acts that a transfer *intervivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator as the case may be; and secs. 13 and 14 of the Transfer of Property Act, and secs. 100 and 101 (now 113 and 114) of the Indian Succession Act were applied to gifts and bequests to unborn persons.

"One important consequence of the above Acts must be noted here. Prior to the passing of the three Acts if a bequest was made by a Hindu in a case governed by the Hindu Wills Act, 1870, in favour, say, of his daughter for her life and after her death to "such of her children who shall attain the age of 21 years," and some of the children were born before and others after the death of the testator, the bequest, though it failed as to those that were not in existence at the death of the testator, did not fail in its entirety but enured for the benefit of those who were in existence at the death of the testator. The reason was that in such a case the bequest to the unborn persons failed not by reason of the rule against perpetuity contained in section 101 of the Indian Succession Act, but by reason of their *personal incapacity* to take. But the bar of personal disability was removed by the three Acts with the result that a bequest to the unborn children in the case put above would now fail by reason of the rule against perpetuities contained in section 101, the gift being to such "children who shall attain the age of 21 years," and the gift would, therefore, fail in regard to the whole class. Before the passing of the three Acts an unborn person could not take at all, and there would, therefore, be no scope for the operation of the rule against perpetuities. Since the

enactment of the three Acts, an unborn person can take, but if he is to take on his attaining the age of 21 years, the bequest offends the rule against perpetuities, and it, therefore, fails by reason of the rule contained in section 101, with the result that section 102 applies and *renders the bequest void in regard to the whole class*. And this is, in fact, what happened in *Soundara Rajan v. Natarajan*, (1925) 48 Mad. 906 (P.C.), 52 I.A. 310. Thus, while before the three Acts were passed, a bequest to a class of persons some of whom were not in existence at the death of the testator did not fail in regard to the whole class, these Acts have brought about a result which, it is conceived, was hardly contemplated when the Acts were passed.

"In view of what is stated above, it is proposed to alter section 15 of the Transfer of Property Act."

The new section lays down that the transfer will not fail with regard to the whole class, but only with regard to those who cannot take.

112A. "Class":—A gift is said to be to a "class" of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula—*per* Lord Selborne in *Pearks v. Moseley*, 5 App. Cas. 714; *Kingsbury v. Walter*, [1901] A.C. 187. "A number of persons are popularly said to form a class when they can be designated by some general name, as "children" "grandchildren" "nephews"; but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons." —Jarman on *Wills* (5th Ed.), Vol. I, p. 232.

16. Where an interest fails by reason of any of the rules contained in sections 13, 14 and 15, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

16. Where, by reason of any of the rules contained in sections 13 and 14, *, *, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Amendment:—This section has been amended by sec. 10 of the Transfer of Property Amendment Act (XX of 1929).

"As section 15 of the Act when amended will no longer provide for the case of a failure of a transfer, reference to that section in section 16 is unnecessary and should be omitted. It is, however, necessary to provide for a case when the transfer may fail as to all the members of the class by reason of the rules contained in sections 13 and 14. Such a case

would arise where a gift over is intended to take effect after a prior gift in favour of a body or a class of persons but the prior gift fails. In such a case, if the prior gift in favour of the class of persons fails by reason of the provisions of sections 13 and 14, the gift over also fails. In order to make this point clear, section 16 should be amended.”—*Report of the Special Committee* (1927).

This section may be compared with section 116 of the Indian Succession Act, 1925.

113. Principle:—The rule in this section is substantially in consonance with the English law according to which limitations under void limitations are themselves void. In English law, where a devise is void for remoteness, all limitations ulterior or expectant on such remote devise are also void. *Jarman on Wills*, 5th Edn., Vol. I, p. 253; *Proctor v. Bishop of Bath*, 2 H. Bl. 358.

Where there was a gift by will to A for life, and after his death to the first son of A for life, and to the first son of A's first son, and in default of such son to B for life, *held* that as the gift to A's grandson was void the subsequent gift to B failed—*Money Penny v. Derring*, 2 DeG. M. & G. 145. A Hindu testator bequeathed as follows:—“My great-grandsons shall, when they attain majority, receive the whole to their satisfaction, and they will divide and take the same in accordance with the Hindu law. God forbid it, but should I have no great-grandsons in the male line, then my daughter's sons, when they are of age, shall take the said property from the trust fund and divide it according to the Hindu Sastras in vogue.” *Held*, that the bequest to the daughter's sons was dependent on, and not alternative to, the gift to the great-grandsons, and was therefore void—*Brojanath v. Anandamoyi*, 8 B.L.R. 208.

114. Gift framed in the alternative:—If a gift is capable of being split up into two alternatives one of which is too remote, and the other can take effect, the Court will disregard the invalid limitations and give effect to that which is legal—*Evers v. Challis*, 7 H.L.C. 531. Thus, a gift over is made of property in the event of there never being any child of A, or in the event of no child attaining majority. Here the first contingency is valid, but the second is too remote (but the gift over will take effect on the happening of the former event)—*Watson v. Young*, 28 Ch. D. 436.

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immoveable, or where accumulation is directed to be

17. (1) *Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—*
(a) *the life of the transferor, or*
(b) *a period of eighteen years from the date of the transfer,*

Direction
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Direction
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made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and, at the end of the year, such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such lastmentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

- (i) *the payment of the debts of the transferor or any other person taking any interest under the transfer, or*
- (ii) *the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or*
- (iii) *the preservation or maintenance of the property transferred;*

and such direction may be made accordingly.

115. Amendment:—By sec. 10 of the Transfer of Property Amendment Act (XX of 1929), the old section 18 has been numbered as section 17, with substantial amendments.

“The restrictions contained in sections 14 and 16 and also the restrictions as to accumulations should not apply to charities, and we propose that the section dealing with accumulations should come immediately after section 16 and be numbered 17, and the section dealing with charities, which is now numbered 17, should be numbered 18.”—*Report of the Special Committee (1927).*

As regards the amendment of the section, the Committee observes:—

“Section 18 (old) relates to the rule against accumulation and provides how long the income of any property transferred can be directed to be accumulated so as to prevent its being received and enjoyed by the transferee. This section and section 117 of the Indian Succession Act allow accumulations for a period of one year only in certain cases. In

England, the Thellusson Act allowed a much longer period. Moreover in certain cases, the restriction against accumulation was not applicable at all. Thus that Act allowed accumulations for the payment of debts and for providing funds for children. Accumulations are also allowed in English Law for maintaining property in good repair [(1891) 2 Ch. 13]. By the Accumulation Act, 1892, and by the Property Act, 1922, some more exceptions were added to the rule enacted in the Thellusson Act. The whole law is now consolidated in sections 164—166 of the Property Act, 1925 (15 Geo. V, c. 20).

“In their report, the Second Indian Law Commission remarked:—‘As to the rule prohibiting accumulation, we all should prefer the more liberal enactments of the Thellusson Act (39 and 40 Geo. III, c. 98), which allow an accumulation for 21 years and do not affect provisions for payments of debts or for raising portions. But as the rule embodied in the Succession Act, section 104, has now been in force for 14 years, Mr. Stokes and Mr. West do not press its alteration.’ Sir Charles Turner was, however, of opinion that the above exemptions were frequently required by the circumstances of large zamindari properties.

“In cases which were not governed by section 18 of this Act or section 104, Indian Succession Act, 1865 (section 117 of the Indian Succession Act, 1925), the rule followed was that if there was nothing *per se* illegal in a direction to accumulate and if such direction was neither so unreasonable in its conditions as to be against public policy, nor given for the purpose of carrying out an illegal object, the direction should be given effect to (I.L.R. 34 Cal. 5). In a case quoted in a footnote in I.L.R. 47 Cal. 88 at page 93, Sir Lawrence Jenkins, after reviewing English and Indian authorities on the subject, remarks—‘A direction to accumulate with a gift of the accumulations is not fundamentally bad; it only fails if it offends some independent rule of Hindu Law.....Or the direction to accumulate may be repugnant and so void, as an attempt to deprive a person of the enjoyment of that which has become his property. But, if, as the decisions I have cited imply, it was within the power of a Hindu testator to direct the accumulations of property to be added to or made part of his own property, then there would seem to be no difficulty in the way of his making a gift of it to a person who under the same gift may become entitled to the original corpus of the testator’s property.... What then is the period during which an accumulation can be validly directed? On principle, I think, it must be for so long a time as the absolute vesting of the entire interest can be withheld, or for so long a time as that during which the corpus of the property can be rendered inalienable, or the course of its devolution can be directed and controlled by a testator.’ Although these decisions show that accumulations may be directed with certain restrictions, they do not lay down any rule which is definite and which Courts can easily follow. It is desirable to lay down definitely on the lines of the English Law the periods and the objects for which a condition as to accumulation should be held valid. It is, however, difficult to adopt the English Law contained in the Property Act, 1925, in its entirety. Section 164 prescribes four periods during which accumulation can validly be directed, *viz.*:—

(a) the life of the grantor or settlor;

(b) a term of 21 years from the death of the grantor, settlor or testator;

- (c) the duration of the minority or respective minorities only of any person or persons living or *en ventre sa mere* at the death of the grantor, settlor or testator;
- (d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

“Rules regarding accumulation are closely connected with the rule against perpetuities. (Cheshire on *Modern Real Property*, p. 482; Fearne on *Contingent Remainders*, p. 537). The English rule of perpetuities has a historical origin and has not been wholly adopted in India. According to the English Law, the perpetuity period is the life of any person or of the survivor of any number of persons, who is or who are alive or *en ventre sa mere* at the moment when the deed or the will which creates the interest begins to operate, *plus* a period of 21 years from the time when such designated person or the survivor of several designated persons dies [*Cadell v. Palmer* (1833) 1 Cl. and F. 372]. The rules against perpetuities in India so far as a transfer *inter vivos* is concerned are contained in sections 13 and 14. Under section 14 no transfer of property can operate to create an interest which is to take effect after the life time of one or more persons living at the date of such transfer and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong. The periods in section 164 of the Property Act, 1925, cannot be incorporated in their entirety in the Transfer of Property Act without affecting the provisions of sections 13 and 14. We, therefore, consider it desirable to permit accumulations during the following periods only:—

- (1) the life of the transferor; or
- (2) a period of 18 years from the date of transfer.

“This would avoid any difficulty of construction. At the same time we think it desirable to accept certain well recognised exceptions in law such as those relating to provisions for the payment of debts, raising portions for children and the repairs to the property transferred. Section 18, therefore, should be amended accordingly.”

This section may be compared with sec. 117 of the Indian Succession Act, 1925.

The provision of law restricting accumulation of income originated from the Thellusson Act (39 & 40 Geo. III, C. 98) which again was the outcome of the decision in the famous case of *Thellusson v. Woodford*, 4 Ves. 227 (affirmed on appeal in 11 Ves. 112), in which the income of the property was directed by the testator to be accumulated for nine lives in succession, and such direction was held to be invalid.

The object of this section is to fix a time-limit for accumulation and thus to prevent the hardship which would have been caused to heirs and descendants if unlimited accumulations were allowed, and also to prevent the property being for ever locked up, which would be a menace to the trade of the country.

116. Hindu Law:—A direction to accumulate is quite in accordance with the mode of Hindu life and thought, and is not against the policy of Hindu Law—*Amrito Lall v. Surnomoyi*, 24 Cal. 589; *Rajendra*

Lal v. Rajkumari, 34 Cal. 5. No hard and fast rule can be laid down with regard to the capacity of a Hindu to direct accumulations. In each case the particular direction must be examined to see whether the object desired was illegal, or whether the effect of carrying out the direction would be to bring about a state of things inconsistent with Hindu Law, or whether the direction to accumulate is so unreasonable in its nature as to be void as being against the public policy of the realm. Thus, if the object of the direction to accumulate were to create a perpetuity, it would be void; if the effect were to make a gift in favour of a donee in future, with no gift *in praesenti*, the direction to accumulate would be illegal being inconsistent with Hindu Law. But a direction to accumulate the surplus income until it amounts to Rs. 1,00,000 and then to spend the proceeds in feeding the poor, does not infringe any rule of Hindu Law relating to gift and is valid—*Rajendra Lal v. Rajkumari*, 34 Cal. 5. Thus, where a testator directed by his will that the surplus income of his estate after making some monthly payments should be accumulated until the death of his widow, upon which event the whole of his estate together with such accumulations should be made over by his trustees to his adopted son on attaining majority, if such son should survive his widow, and, if not, to his daughters and their sons, *held*, that such a direction to accumulate was not invalid according to Hindu Law—*Amrito Lal v. Surnomoyi*, 24 Cal. 589. The direction in a will to accumulate the income till the boy to be adopted attained the age of 16 years, was held not to be a direction to accumulate it for ever and could not be treated as infringing the law as to perpetuities—*Jamnabai v. Dharsey*, 4 Bom.L.R. 893. A direction to accumulate for the purpose of providing for the marriage expenses of the testator's son is good—*Nafar Chandra v. Ratnamala*, 15 C.W.N. 66, 13 C.L.J. 85, 7 I.C. 921. See also *Watkins v. Administrator-General*, 47 Cal. 88 (92, 93) in which all the Indian and English cases on accumulation have been cited and discussed.

But a direction for accumulation *for all time*, or until the rents and profits aggregated to three lacs of rupees or any other certain amount is void, as being a trust for an illegal purpose, namely, of creating a perpetuity—*Krishnaramani v. Ananda*, 4 B.L.R.O.C. 231. A trust for the accumulation for 99 years of the surplus income of an estate, empowering the trustees to continue such trust after the expiration of the 99 years' term and making no disposition of the beneficial interests in the estate was held void—*Ashima Krishna v. Kumar Krishna*, 2 B.L.R.O.C. 11. Creation of several interests to take effect successively is not against the rule. Thus, the grantee may provide for the enjoyment of A until B attains the age of 25; but a provision that the property shall accumulate until B attains that age is void—*Tribhovandas v. Smith*, 20 Bom. 316. Under the present section, however, the direction would not be void if it falls within the time-limit hereby prescribed.

17. The restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the advance-

Transfer in perpetuity for benefit of public.

18. The restrictions in sections 14, * * 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in

Transfer in perpetuity for benefit of public.

ment of religion, knowledge, the advancement of religion, commerce, health, safety, or knowledge, commerce, health, any other object beneficial to safety, or any other object mankind. beneficial to mankind.

116A. Amendment:—The old section 17 has been numbered as section 18, and in the latter section the words “and 17” have been added, by section 10 of the Transfer of Property Amendment Act (XX of 1929). The object of this amendment is to lay down that “the restrictions contained in sec. 17 as to accumulation should not apply to charities. In India a direction for accumulation has been held valid in the case of Hindu and Muhammadan religious endowments though it infringed the rule against perpetuities (I.L.R. 34 Cal. 5; 23 C.L.J. 241; 34 Mad. 12).”—*Report of the Select Committee (1927)*.

117. Gifts for public purposes:—The personal law of Hindus and Mahomedans sanctions gifts for the benefit of the public, *e.g.*, for charitable and religious purposes, and such gifts are exempt from the rule against perpetuities—*Fatma Bibi v. Advocate-General*, 6 Bom. 42; *Bhuggobutty v. Gooroo Prosonno*, 25 Cal. 112; *Sookmoy v. Monohari*, 11 Cal. 684; *Bikani v. Suklal*, 20 Cal. 116; *Limji v. Bapuji*, 11 Bom. 441.

The following are religious and charitable gifts:—

(a) *Wakf* or endowment to charitable and religious uses, *e.g.*, repairs of *imambaras*, keeping *tazias* in the month of Mohurram—*Biba Jan v. Kalle Hussain*, 31 All. 136; burning lamps in a mosque or reading the Koran in public places—*Mazhar Husein v. Abdul*, 33 All. 400; performance of ceremonies known as *Kadam Sharif*—*Phul Chand v. Akbar Yar Khan*, 19 All. 211.

(b) Gifts of property to temple or idol or for maintenance of priests—*Thackersay v. Hurbhum*, 8 Bom. 432; *Bhuggobutty v. Gooroo Prosonno*, 25 Cal. 112.

(c) A gift of *Sadavart* (food given to all comers)—*Jamnabai v. Khimji*, 14 Bom. 1; *Jugal Kishore v. Lakshman Das*, 23 Bom. 659.

(d) Dedication of property to a *dharamasala*, for feeding travellers and maintaining a *Sadavart*—*Jugal Kishore v. Lakshman*, 23 Bom. 659; *Raghubar v. Kesho*, 11 All. 18.

(e) A bequest for giving feasts to Brahmans—*Lakshmi Sankar v. Vaijnath*, 6 Bom. 24.

(f) Gifts for building a well and *azwada* (a cistern of water for animals to drink)—*Jamnabai v. Khimji*, 14 Bom. 1.

(g) A devise for the support or erection of a hospital—*Fanindra v. Administrator-General*, 6 C.W.N. 321.

(h) Gifts for maintaining universities or schools of learning—*Manorama v. Kalicharan*, 31 Cal. 166.

See also the Illustrations to Sec. 118, Indian Succession Act (1925) for instances of religious and charitable gifts.

118. The following are not gifts for public purposes:—

(a) Trusts for purposes of *individual* benefit, *e.g.*, a bequest to the effect “that the income thereof be given to procure masses for the benefit of my soul”—*Colgan v. Administrator-General*, 15 Mad. 424; an endowment by which the original grantor and grantee and their descendants are alone to be benefited—*Sathappayar v. Periasami*, 14 Mad. 1; a gift for

the performance of ceremonies for the spiritual good of the donor or his family—*Trimmer v. Lamb*, 25 L.J. Ch. 424; *Limji v. Bapuji*, 11 Bom. 441; *Fatma Bibi v. Advocate-General*, 6 Bom. 42.

(b) A gift for the repair of a private tomb or monument—*Richard v. Robson*, 31 L.J. Ch. 397; *Fowler v. Fowler*, 33 Beav. 616.

A bequest to a “dharma” and directing the executors to spend the income of moveable and immoveable property set apart for the purpose, was held void, as the word ‘dharma’ was too vague and indefinite for the Court to enforce the gift—*Devshunkur v. Motiram*, 18 Bom. 136; *Morarji v. Nenbai*, 17 Bom. 351; *Runchordas v. Parbati*, 23 Bom. 725 (P.C.).

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith, or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

Vested interest.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that, if a particular event shall happen, the interest shall pass to another person.

This section (with the Explanation) may be compared with section 119 of the Indian Succession Act, 1925.

120. Vested interest and contingent interest:—An interest is said to be *vested*, when it is not subject to any condition precedent—when it is to take effect on the happening of an event which is *certain*; whereas an estate is *contingent* when the right to enjoyment depends upon the happening of an *uncertain* event which may or may not happen. A person takes a vested interest in property when he acquires a proprietary right in it but the right of enjoyment is only deferred till a future event happens which is certain to happen; but a contingent interest is one in which neither any proprietary interest nor a right of enjoyment is given at present, but both depend upon future uncertain events. Thus, if a Hindu widow adopts a son but there is an agreement postponing the son’s estate during the life-time of the widow, the interest created in favour of the adopted son is a vested right; it does not depend upon any condition precedent (*e.g.*, the performance of an act); it is to take effect on the happening of an event which is certain (*viz.*, the widow’s death); the adopted son has a present proprietary right in the estate, the right of possession and enjoyment being deferred; and therefore he can transfer the property during the widow’s life-time (see 40 All. 692 cited in Note 43 under sec. 6).

Similarly, where under a deed of gift a donee is not to take possession of the gifted property until after the death of the donor and his wife, the donee is given a vested interest, subject only to the life-interest of the donor and his wife; and the donee can transfer the property during the life-time of the donor or of his wife (see 21 O.C. 312 cited in Note 43 under sec. 6). So also, where under a compromise decree it was settled that A was to hold an estate till his death after which it was to go to B, *held* that the interest acquired by B under the decree was a vested interest, because the interest which was created in favour of B was bound to take effect from the death of A, which is a *certain* event—*Sundar Bibi v. Rajendra*, 47 All. 496, 23 A.L.J. 337, A.I.R. 1925 All. 389, 86 I.C. 684. But where an estate is bequeathed to A until he shall marry, and after that event to B, B's interest in the bequest is *contingent*, because it depends upon a condition precedent, *viz.*, the marriage of A, an event which *may or may not* happen. B has at present no proprietary interest in the estate, and he cannot alienate it. But as soon as A marries, the contingent interest of B becomes a vested interest because of the happening of the event (A's marriage) on which it was so long contingent (see sec. 21). In a contingent interest, the transfer is not complete until the specified event happens or does not happen. In a vested interest, the interest is complete, but on the happening of a specified event it may be divested—*Festing v. Allen*, 5 Hare 573; *In re Eddel's Trusts*, L.R. 11 Eq. 559.

The true criterion is the certainty or uncertainty of the event on the happening of which the gift is to take effect. Where the event is *certain* though future, and the payment or enjoyment is postponed by reason of the circumstances connected with the estate or for the convenience of the estate, as for instance, where there are prior life or other estate or interests, the ulterior interest to take effect after them will be *vested*. Thus, under a gift by a testator to A at the decease of the testator's wife, A's interest vests at the testator's death—*Subramaniam v. Subramaniam*, 4 Mad. 124, following *Blamire v. Geldart*, 16 Ves. J., 314; *Jairam v. Kuberbai*, 9 Bom. 491. Where a will provided as follows:—"When I die, my wife named Suraj is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present, and, in case of my wife's death, my daughter Mahalaxmi is owner of the said property after that death," *held*, that the gift over to Mahalaxmi was not *contingent* on her surviving Suraj, but depended upon the death of Suraj which was a *certain* event, and that Mahalaxmi took a *vested* interest in the property subject to the life-interest given to Suraj—*Lallu v. Jagmohan*, 22 Bom. 409 (414).

121. Vesting is not postponed:—The fact that the estate granted is subject to partial trusts or charges for partial purposes does not postpone the vesting in possession. Thus, where a testator, after directing the payment of some annuities to some persons for their lives, gave the whole of his property to his grandsons to be divided among them only after the annuities have ceased on the death of the annuitants, *held* that the fact that the estate was subject to partial trusts did not postpone the vesting in possession of the gift to the grandsons—*Cally Nath v. Chunder Nath*, 8 Cal. 378. So also, a bequest in favour of a person simply (*i.e.*, without any intimation of a desire to suspend or postpone its operation) confers a vested interest, and the appointment of an executor or a

guardian to that person while he is a minor, with a direction to make over the property to him on his attaining majority, does not postpone the vesting of interest—*Harris v. Brown*, 28 Cal. 621 (P.C.). But where the testator directs that the interest shall vest at a *particular time* or on the donee attaining a particular age, it vests at the time fixed by him—*Glanwill v. Glanwill*, 2 Mer. 38; *Knight v. Cameron*, 14 Ves. 389.

122. Construction—Intention of donor:—The question whether particular words create a vested or a contingent interest is one of construction—*Cally Nath v. Chunder Nath*, 8 Cal. 378. No particular words are necessary to the vesting of an interest, and the words of the grantor must be construed in their plain ordinary meaning. Words which have become by accepted usage terms of art in England do not exist in the vernaculars of India where the English mode of creating interests is but of recent origin—*Harris v. Brown*, 28 Cal. 621; *Le Mesurier v. Wajid*, 29 Cal. 890. Where the ultimate object of the testator was clearly to make a gift of the property to the donees, who were also executors, but he directed that a sufficient fund from it should be provided during the life-time of his wife to pay her a certain sum monthly, and charged the property with payment of another sum to his other wife, it was held that as the estate was devised to the executors not for, but subject to, a particular purpose, they were not trustees but devisees of an estate subject to a charge. The testator *vested* the property in the executors, but postponed their beneficial interest in it until his younger wife's death—*Subrahmaniam v. Subrahmaniam*, 4 Mad. 124; *King v. Denison*, 1 Ves. & B. 272.

123. Para. 2—Death of the transferee:—A vested interest is not defeated by the death of the transferee before he obtains possession; and his representative will be entitled to its benefit. This is another point of distinction between a vested interest and a contingent interest.

Therefore, where out of two persons in whom an estate vests, one person dies, the whole property does not pass to the other by survivorship but is divisible between the living person and the heir of the deceased—*Krishna Aiyar v. Swaminath*, 1918 M.W.N. 503, 8 L.W. 140, 47 I.C. 723.

124. Explanation:—*Postponement of enjoyment:*—An interest may be a vested one, though its enjoyment may be postponed. Thus, where a Hindu testator made a sufficiently clear gift of his property to his grandsons living at his own decease, but endeavoured to postpone the possessory enjoyment of his grandsons to a certain period after his death, and directed the accumulation of the profits of his estate for a longer period, *held* that the will contained sufficiently clear words of present gift to the grandsons, and that the other clauses postponing enjoyment and possession and directing accumulation must be rejected as inconsistent with or repugnant to the vested interest—*Cally Nath v. Chunder Nath*, 8 Cal. 378, following *Singleton v. Gilbert*, 1 Cox. 68. Where a testator directed that, out of the net income of his estate, his trustees should expend Rs. 500 every year for the maintenance of J. (a minor) and that, when J should attain the age of 30 years, the trustees should give to J the net residue of his property remaining at that time, *held* that the property vested in J on the testator's death, and that the direction for postponement of enjoyment till the age of 30 years must be disregarded, and was inoperative after his majority, and that the income of the property including all income which accrued since his majority, must be paid to J—*Gosavi Shirgar v. Rivett-Carnac*, 13 Bom. 463.

Prior interest given to some person:—An interest may be vested though the prior interest may be given to some other person. Where the enjoyment is postponed by reason of circumstances connected with the estate or for the convenience of the estate, as it has been termed, for instance, where there are prior life or other estates or interests, the ulterior interest to take effect after them will be vested. Thus, under a gift by a testator to A at the decease of the testator's wife, A's interest vests at the testator's death—*Blamire v. Geldart*, 16 Ves. J. 314. See also *Cally Nath v. Chunder Nath*, 8 Cal. 378 cited under Note 121 above.

Direction for accumulation of income:—A gift in terms which import a present vested interest with a postponed time of payment is not made contingent by a direction to accumulate till the time of payment arrives—*Blease v. Burgh*, 2 Beav. 226. After the interest has vested, the donee is entitled to the income arising therefrom during the period of suspension, provided there is no prior interest, notwithstanding any direction for postponement of enjoyment—*Gosavi v. Rivett Carnac*, 13 Bom. 463.

Interest passing to another person on the happening of a particular event:—Where there is a gift to an infant with remainder over in the event of his dying under 21, the infant has a vested interest subject to be divested on his death under that age. See the Indian Succession Act (1925), Sec. 119, Illustration (vi); *O'Mahoney v. Burdett*, L.R. 7 H.L. 388; *Maseyk v. Fergusson*, 4 Cal. 304.

125. Right of heir to inherit property:—The right of a son or daughter or other heir of a person to inherit that person's property on his death is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not come within the definition of a "vested interest" in this section or of a "contingent interest" in Sec. 21 *infra*, or Sec. 120 of the Indian Succession Act (1925)—*Abdool v. Goolam*, 30 Bom. 304.

20. Where on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest although he may not be entitled to the enjoyment thereof immediately on his birth.

When unborn person acquires vested interest on transfer for his benefit.

126. A bequest to an unborn person is not payable until the birth of the person, and the intermediate income would necessarily accumulate for his benefit—*Gibson v. Lord Montfort*, 1 Ves. 485. But it would be otherwise if the bequest is contingent—*Haughton v. Harrison*, 3 Atk. 329; *Shawe v. Cudliffe*, 4 Br. C.C. 144.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest in the former case on the

Contingent interest.

happening of the event; in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income, or so much thereof as may be necessary, to be applied for his benefit, such interest is not contingent.

Compare section 120 of the Indian Succession Act, 1925.

As to the difference between a vested interest and a contingent interest, see Note 120 under sec. 19.

127. Contingent interest:—*Examples:*—A sum of money is bequeathed to A in case he shall attain the age of 18 or when he shall attain the age of 18. A's interest in the legacy is contingent until the condition shall be fulfilled by his attaining that age—*Illustration (ii)* to sec. 120, Indian Succession Act (1925); *In re Francis*, (1905) 2 Ch. 295. A devise upon trust of land towards the maintenance of the testator's daughter until she should attain the age of 25, and from and after her attaining that age, then upon trust for his said daughter, creates a contingent interest in favour of the daughter until she attains 25—*Doe d Cadogan v. Ewart*, 7 Ad. & El. 636. Similarly, when the creation of the interest is subject to a condition precedent to be performed by the donee, the interest is manifestly contingent until the condition is fulfilled—*Phipps v. Williams*, 5 Sim. 44. Thus, an estate is bequeathed to A if he shall pay Rs. 500 to B. A's interest in the bequest is contingent until he has paid Rs. 500 to B—*Illustration (viii)* to sec. 120, Indian Succession Act, 1925.

128. Exception:—The principle of the exception is that where the principal is given at a distant epoch and the whole income is given in the meantime, the Court leaning in favour of vesting has said that the whole thing is given; but if there occurs an interval or gap, which separates the gift of the interest from the principal, it is not vested—*per* Page-Wood V.C., in *Pearson v. Dolman*, L.R. 3 Eq. 315 (321). Where interim interest is given, it is presumed that the testator meant an immediate gift—*Vaudry v. Geddes*, 1 Russ. & M. 208. "I do not know of any case in which the whole income has been absolutely given for maintenance, and yet the legacy has been held not to be vested"—*per* Jessel, M. R., in *Bolding v. Strungell*, 45 L.J. Ch. 208. Compare *Gosavi v. Rivett-Carnac*, 13 Bom. 463, cited in Note 124 under sec. 19.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

This section may be compared with sec. 121 of the Indian Succession Act (1925). So long as the donees are below the specified age, they possess only a *contingent* interest which will mature into a vested interest as soon as they attain the specified age.

129. Gift to a class:—As to the meaning of 'class' see notes under sec. 15. Where a testator gave his residuary estate to trustees in trust for his nephews and nieces, to be paid in certain proportions and at certain times (*viz.*, that the share of each nephew shall be paid to him upon his attaining the age of 21 years, and the share of each niece to be paid to her on her attaining the age of 21 or previously marrying) with benefit of survivorship between them, *held* that the legatees took vested interests, and that the period of distribution alone was postponed but the bequests were valid—*Maseyk v. Fergusson*, 4 Cal. 304 following *Williams v. Clark*, 4 DeG. & S. 472. Similarly, a gift to children when the youngest attains the age of 21, creates a vested interest in favour of every member who attains 21, although he may not live till the youngest attains 21 or the youngest may die under 21—*Re Hunter*, 1 Eq. 295; *Cooper v. Cooper*, 29 Beav. 229; *Hughes v. Hughes*, 3 Br. C.C. 35.

23. Where on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer contingent on happening of specified uncertain event.

This section may be compared with section 124 of the Indian Succession Act.

130. Principle:—The object of this section is to prevent property from remaining without any owner. At all times property must vest in some particular person or other. It should never be without an owner. See *Abiss v. Burney*, 17 Ch. D. 211 (at p. 229).

The principle of this section does not apply to Hindus. A gift in remainder, expectant on the termination of an estate for life, does not fail, but is accelerated by reason of the gift of such prior estate not taking effect—*Adjudhia v. Rakhman*, 10 Cal. 482 (P.C.).

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Transfer to such of certain persons as survive at some period not specified.

Illustration.

A transfers property to B for life, and after his death to C and D equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

Analogous Law:—Compare sec. 125, Indian Succession Act, 1925.

131. Cases:—A testator directed his trustees and executors to divide his property among his sons when they should attain the age of 21, and there was also a provision in the will that in the event of any

such person dying in the testator's life-time or at any time thereafter prior to division, leaving lawful issue, such issue should take the estate of the deceased parent. One of the legatees who had attained the age of 21 at the testator's death, died some months after, leaving issue; *held* that at the testator's death the legacy vested in the legatee, but became divested by the legatee's death prior to division, and that the gift over to the issue of the legatee was not void but took effect—*Bachman v. Bachman*, 6 All. 583.

If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole—*Humphrey v. Tayleur*, 1 Ambler 138, followed in *Nandi Singh v. Sitaram*, 16 Cal. 677 (P.C.).

If all the legatees predecease the tenant for life, their representatives will take; for the event which was to divest them not having happened, the original gift remains. (Thus in the Illustration to this section, if both C and D die in the life-time of B, the property after B's death will pass to the representatives of C and D). See Henderson's *Testamentary Succession*, 2nd Ed., p. 116; See also *Brown v. Kenyon*, 3 Maddock 410; *Re Sander's Trusts*, 1 Eq. 675; *Harrison v. Foreman*, 5 Ves. 207.

132. "Surviving at some period":—The words 'surviving at some period' refer to the period when the payment or distribution is to be made—*Stevenson v. Gullen*, 18 Beav. 590; *Howard v. Collins*, 5 Eq. 349. Cf. the words of sec. 125, Indian Succession Act, 1925.

25. An interest created on a transfer of property, and dependent upon a condition, fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Conditional transfer.

Illustrations.

(a) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer, C was dead. The transfer is void.

(c) A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

(d) A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

Analogous Law:—Compare secs. 126 and 127, Indian Succession Act, 1925, and secs. 23 and 36, Indian Contract Act.

"*Dependent upon a condition.*"—The condition referred to in this section is a condition *precedent* as distinguished from a condition *subsequent*.

133. Condition precedent and condition subsequent:—*Distinctions:*—

(1) A condition *precedent* is one which must happen before the estate can commence. A condition *subsequent* is one by the happening of which an existing estate will be defeated.

(2) Where the condition is precedent, the estate is not in the grantee

until the condition is performed; but where the condition is subsequent, the estate immediately vests in the grantee and remains in him till the condition is broken—*Wynne v. Wynne*, 2 M. & G. 8 (at p. 14).

(3) In the case of a condition precedent being or becoming impossible to be performed or being immoral or opposed to public policy, the estate will not arise and the transfer will be void. See this section. But in the case of an impossible or immoral condition subsequent, the estate will be or becomes absolute and the condition will be ignored. Thus, if a gift was made with a condition superadded that the donee should marry a certain person on or before she attained the age of 21, and the person named died before she attained that age, it was held that the fulfilment of the condition subsequent having become impossible, the estate became absolute—*Thomas v. Howell*, 1 Salk, 170; Jarman on Wills, Vol. II, p. 12. A gift to which an immoral condition is subsequently attached remains a good gift, though the condition is void—*Ram Sarup v. Bela*, 6 All. 313 (P.C.). There is a clear distinction between an immoral consideration for a gift, and an immoral condition which is subsequently attached to a gift. If the consideration itself is immoral the transfer falls to the ground. On the other hand, if a subsequent condition is tried to be attached to a perfectly valid gift, then the condition, if immoral, is void but the gift remains unaffected—*Ghumna v. Ramchandra*, 47 All. 619, A.I.R. 1925 All. 437, 88 I.C. 411.

(4) A condition subsequent must be strictly fulfilled (sec. 29), but a condition precedent is fulfilled if it is substantially complied with (sec. 26). See notes under sec. 26.

134. Fulfilment impossible:—The fulfilment of a condition may become impossible either at the time the interest is created or subsequently, but in either case the transfer will fail. See Jarman on Wills, Vol. II, p. 12. When the fulfilment of a condition becomes impossible by act of God, the condition becomes void, and the transfer fails—*Ibid*, p. 13. See *In re Greenwood*, [1903] 1 Ch. 749. But if the performance of the condition becomes impossible by the fraud of a person interested in the non-fulfilment of the condition, the condition shall as against him be deemed to have been fulfilled; see section 34 *infra*.

“Mere difficulty in performance is not to be counted as an impossibility”—Shephard & Brown, 7th Edn., p. 95.

135. Forbidden by law:—The fulfilment of a condition may be forbidden by any law of the land, and it is not necessary that the prohibition should be express—*Forster v. Taylor*, 5 B. & A. 887.

For instances of conditions forbidden by law, see Secs. 26-30, Contract Act.

136. Immoral or opposed to public policy:—An agreement which has for its object the getting of divorce by the wife from her husband is against public policy—*Bai Valji v. Nansa Nagar*, 10 Bom. 152. A transfer by way of bribe (*Harrington v. Victoria Graving Dock Co.*, 3 Q.B.D. 549) or for the purpose of prostitution (*Pearce v. Brookes*, L.R. 1 Ex. 213) is void. Where the donor made a gift of his property to a man and his wife on condition that he should have physical enjoyment of the woman, held that the condition being immoral, the gift was void—*Ghumna v. Ram Chandra*, 47 All. 619, 88 I.C. 411, A.I.R. 1925 All. 437. See also Notes 63 and 64 under sec. 6.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Fulfilment of condition precedent.

Illustrations.

(a) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

Compare sec. 128 of the Indian Succession Act, 1925.

Principle:—This section is based upon the principle of favouring the early vesting of estates. See *Scott v. Tyler*, 2 W. & T.L.C. 146. This section and the next lay down the doctrine of *cy pres* with reference to the fulfilment of a condition precedent. It is sufficient if a condition precedent is performed *cy pres*, i.e., so performed as to substantially fulfil the testator's intention. See Williams on Executors, 11th Edn., p. 1013.

137. Substantial compliance:—A condition *precedent* is fulfilled if it is substantially complied with; but a condition subsequent must be strictly fulfilled (sec. 29).

Conditions *subsequent* that go in defeasance shall be taken strictly, for they are odious, and hence it is that unless they are strictly fulfilled, the ulterior disposition shall not take effect. But in the case of a condition *precedent*, as the estate cannot commence until the condition is performed, the condition is beneficial as creating an estate and ought to be construed favourably—*Scott v. Tyler*, 2 W. & T.L.C. p. 146. The law is always in favour of vesting of estates (*Taylor v. Graham*, 3 App. Cas. 1287) and a condition precedent should be construed in favour of the devisee.

Where a testator bequeathed a legacy on condition that the legatee should “humbly apply for subsistence,” but the legatee instead of “humbly applying” claimed *as of right* and claimed twelve times the amount of the bequest as maintenance “suitable to his rank and position,” the bequest failed as there was no substantial compliance with the condition—*Veera-bhadra v. Chiranjivi*, 28 Mad. 173 (P.C.).

Where a house is given on condition of residence therein, but no manner or period of residence is prescribed, the occasional use of the house and keeping an establishment therein with the intention of using it again as residence, is a sufficient compliance with the condition—*In re the Tagore case*, 1 I.A. 387, 22 W.R. 377.

Where, by an agreement between a female and three male persons, it was agreed that a certain property should not be transferred by the female without the consent of the other party constituted by the three male persons, *held* that it was not a substantial compliance with this section if the consent of only one of the three was obtained (the other two being dead at the time). Broadly speaking, till the majority or at least one

half of the people whose consent is necessary give it, it cannot be said that there has been a *substantial* compliance with the condition—*Benichand v. Ekram Ahmed*, A.I.R. 1926 All. 181, 90 I.C. 887. Cf. Illustration (a).

Ignorance of condition:—The mere fact that a person to whom a grant is made is ignorant of the condition to be performed is no excuse for not fulfilling it—*In re Hodge's Legacy*, 16 Eq. 92; *Astley v. Earl of Essex*, 18 Eq. 290. A person who takes under an instrument cannot plead want of knowledge of its contents as an excuse for non-compliance—*Porter v. Fry*, 1 Vent. 199.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and, by the same transaction, an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) A transfers Rs. 500 to B on condition that he shall execute a certain lease within 3 months after A's death, and if he should neglect to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect.

(b) A transfers property to wife; but, in case she should die in his lifetime, transfers to B that which he had transferred to her. A and his wife perish together under circumstances which made it impossible to prove that she died before him. The disposition in favour of B does not take effect.

Compare sections 129 and 130, Indian Succession Act, 1925. The illustration (b) has been taken from *Underwood v. Wing*, 4 DeG. M. & G. 633.

The rule in this section applies both to moveable and immoveable properties—*Evastoff v. Austin*, 19 Beav. 591; *Jull v. Jacobs*, 3 Ch. D. 703.

138. Acceleration:—This section enunciates the doctrine of acceleration. Thus, where there is a gift in remainder, expectant on the termination of an estate for life, and the prior life estate becomes void, the gift does not fail but is accelerated—*Adjudhia v. Rakhman*, 10 Cal. 482 (P.C.). Where in a series of successive limitations, a particular estate is void *ab initio*, the remainder, which is immediately expectant upon such estates, accelerates. Thus, where there was a gift to the testator's daughter of real and personal estate "during her lifetime, and, after her decease, the property to be equally divided between her children on their becoming of age" and the gift to the daughter was void on account of her having attested the will, it was held that the gift to the

children was accelerated and took effect immediately—*Jull v. Jacobs*, 3 Ch. D. 703. So also, where the prior estate is revoked by the donor and thus fails, the remainder immediately expectant upon it accelerates—*Fell v. Biddulph*, L.R. 10 C.P. 701.

Where there is a gift to a legatee, with a gift over to another if the legatee neglects to perform a condition, the gift over takes effect if the legatee never comes into existence or dies before the testator or if the gift to the legatee is itself void, so that the legatee is never able to perform the condition and thus the prior disposition fails—*Scatterwood v. Edge*, 1 Salk. 229; *Avelyn v. Ward*, 1 Ves. 420; *Re Green's Estate*, 1 Dr. & S. 68. Where a testator made a gift to a son to be adopted by his widow, and, on the death of such adopted son without issue in the widow's lifetime, to his (testator's) daughters, and the power of adoption given to the widow was invalid, *held* that the executory gift to the daughters took effect as the prior gift failed *ab initio* by reason of its object never coming into existence—*Radha Prosad v. Rani Monee*, 33 Cal. 947. A devise was made by X to his child *en ventre sa mere* (under the misapprehension that his wife was *enciente*) and if such child died before a certain age, then a gift to another. When it was found that the wife was not *enciente*, the ulterior estate became accelerated and did not become void—*Wing v. Angrave*, 8 H.L.C. 183; *Hall v. Warren*, 9 H.L.C. 420; *Jones v. Westcomb*, 1 Eq. Cas. Abr. 245.

An award of an arbitrator provided that the managership of certain endowed property should devolve on the next successor after it had been held by the previous one for 21 years. The manager who had been appointed for a term of 21 years died before the expiry of the full period. *Held* that the effect of the failure of the prior interest was to accelerate the subsequent interest even though the failure did not take place in the precise manner laid down in the award. The intention of the arbitrator was clearly that the ulterior disposition was to take effect on the failure of the prior one, and not that the ulterior disposition was to be ineffectual unless the previous manager completed his full term of 21 years—*Debi Shankar v. Nand Kishore*, 8 O.W.N. 1138, A.I.R. 1932 Oudh 161 (163), 135 I.C. 395. Where a testator directed that if his pregnant wife should bring forth a son, his property should go to the son, and, if a daughter, she should only have a right of maintenance, and that if the son born should die before attaining age, the property should go over to the testator's brother N, and the wife gave birth to a daughter, *held* that the gift over in favour of N took effect on failure of the gift to the son, even though such failure was not in the precise manner expressed in the terms of the gift—*Okhoy-money v. Nilmony*, 15 Cal. 282, following *Jones v. Westcomb*, (*supra*).

28. On a transfer of property, an interest therein may be

Ulterior transfer conditional on happening or not happening of specified event.

created to accrue to any person with the condition superadded that, in case a specified uncertain event shall happen, such interest shall pass to another person, or that

in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25, and 27.

This section may be compared with sec. 131, Indian Succession Act, 1925, from which the following Illustrations may be quoted:—

*“Illustration (i):—*A sum of money is bequeathed to A, to be paid to him at the age of 18, and if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be divested and to go to B, in case A shall die under 18.

*“Illustration (ii):—*A sum of money is bequeathed to A for life, and after his death to B, but if B shall then be dead leaving a son, such son is to stand in the place of B. B takes a vested interest in the legacy subject to be divested if he dies leaving a son during A's life-time.”

139. Condition superadded:—It means ‘condition subsequent.’

Examples:—(a) The death of the donee without leaving a son or son's son—*Soorjeemoney v. Denobundhoo*, 9 M.L.A. 123. Thus, a father may make a gift of his property absolutely to his daughter with a condition superadded that if she does not beget any male issue, the property shall revert to the family of the donor (father)—*Hira Moni v. Anmol*, 26 A.L.J. 944, A.I.R. 1928 All. 699 (702).

(b) The donee marrying or not marrying a particular person or class of persons named—*Page v. Haywood*, 2 Salk. 570.

(c) The death of the donee before attaining a certain age—*Doe d. Hunt v. Moore*, 14 East 604; *Maseyk v. Fergusson*, 4 Cal. 304.

(d) Change of religion—*Seymour v. Vernon*, 33 L.J. Ch. 690; *Biddulph v. Lees*, 28 L.J.Q.B. 211.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Fulfilment of condition subsequent.

Illustration.

A transfers Rs. 500 to B to be paid to him on his attaining majority or marrying, with a proviso that if B dies a minor, or marries without C's consent, the said Rs. 500 shall go to D. B marries, when only 17 years of age, without C's consent. The transfer to D takes effect.

Compare sec. 132 of the Indian Succession Act, 1925.

140. Strictly fulfilled:—A condition subsequent must be *strictly* fulfilled, whereas a condition *precedent* is deemed to be fulfilled if it is *substantially* complied with (see sec. 26). Conditions subsequent that go in defeasance of a vested interest shall be taken strictly, for they are odious; and hence it is that unless they are strictly fulfilled the ulterior disposition cannot take effect—*Scott v. Tyler*, 2 W. & T. L. C. 146 (189); *Egerton v. Brownlow*, 4 H.L.C. 1; *Clavering v. Ellison*, 3 Drew 451.

A condition subsequent which is impossible of performance is ignored as non-existent, and does not defeat the vested interest—*In re Brown's Will*, 18 Ch. D. 61. Thus, where there was a clause in a gift to the donor's daughter that she should marry his nephew at or before she attained the age of 21, and the nephew died before she attained that age, it was held that the condition subsequent, having become impossible of performance by the act of God, must be ignored—*Thomas v. Howell*, 1 Salk. 170; *Graydon v. Hicks*, 2 Atk. 16. (But the effect would be otherwise in the case of a condition *precedent*, see Note 133 to sec. 25).

Where only a portion of the condition is impossible, the non-perform-

ance of the impossible portion may be excused—*Collett v. Collett*, 35 Beav. 312.

So also, a breach of a condition subsequent on account of duress does not result in forfeiture of the interest. Thus, a testator directed that if any of the female members of his family should wilfully leave the family dwelling house and live in any other place they should forfeit their rights under the will. The plaintiff, a widowed and minor daughter-in-law of the testator was taken away from the house by her maternal relations with the aid of the police, and she resided with her mother. *Held* that there was a plain case of duress on the girl, and the absence of the girl, although in contravention of the direction of the testator, ought not to be treated as working a forfeiture—*Tincouri v. Krishna Bhabini*, 20 Cal. 15.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to B for her life, and, if she does not desert her husband, to C. B is entitled to the farm during her life as if no condition has been inserted.

Compare section 133 of the Indian Succession Act, 1925.

141. The principle of this section is that specific trusts or specific estates good in themselves are not invalidated by a subsequent illegal disposition of the residue or remainder—*Krishnaramani v. Ananda*, 4 B.L.R.O.C. 231; *Tagore v. Tagore*, 9 B.L.R. 377 (P.C.); *Khetter v. Gunganarain*, 4 C.W.N. 671 (Footnote).

For an application of the principle of this section, see the Privy Council decision in *Narsing Rao v. Mahalakshmi*, 50 All. 375, 32 C.W.N. 1065 (1076), 109 I.C. 703, A.I.R. 1928 P.C. 156, 55 I.A. 180.

31. Subject to the provisions of section 12, on a transfer of property, an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

Illustrations.

(a) A transfers a farm to B for his life, with a proviso that in case B cuts down a certain wood the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b) A transfers a farm to B provided that, if B shall not go to England within three years after the date of transfer his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Compare sec. 134 of the Indian Succession Act, 1925.

142. A Hindu testator devised some property in favour of his wives but there was a direction that they should live in the house, and that any one acting contrary to the terms of the will should be deprived of her

interest which should thereupon devolve on the other heirs. The younger widow did not live in the house; *held* that she forfeited her interest in the property, and the next reversionary heir was entitled to take under the gift over—*Bhabotarini v. Pearylal*, 24 Cal. 646. Even though the estate given be an *absolute estate*, a condition may be super-added that the estate would be divested on the happening of a particular contingency. Such a condition is not invalid, either under the law in England or India—*Ahmad Azim v. Shafi Jan*, 2 Luck. 335, A.I.R. 1926 Oudh 561 (574), 97 I.C. 897.

A condition subsequent by way of defeasance, mentioned in this section, is in the nature of a penalty: consequently the Court does not enforce it in every case (Cf. Note 140 under sec. 29). The Court will generally pass a decree for damages for non-performance of the condition—*Munshi Lal v. Ahmad Mirza*, 10 O.W.N. 759, 144 I.C. 756, A.I.R. 1933 Oudh 291 (294), following *Popham v. Bamfield*, 23 E.R. 325.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Such condition must not be invalid.

This section may be compared with sec. 135 of the Indian Succession Act, 1925. For invalid conditions see sec. 25.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Transfer conditional on performance of act, no time being specified for performance.

This section may be compared with sec. 136 of the Indian Succession Act, 1925, from which the following illustrations may be cited:—

*“Illustration (i):—*A bequest is made to A with a proviso that unless he enters the army, the legacy shall go over to B. A takes holy orders and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

*“Illustration (ii):—*A bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B’s daughter. A marries a stranger, and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect.”

Also compare sec. 34 of the Contract Act.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such

Transfer conditional on performance of act, time being specified.

performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall, as against him, be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But, if no time is specified for the performance of the act, then, if its performance is, by the fraud of a person interested in the non-fulfilment of the condition, rendered impossible or indefinitely postponed, the condition shall, as against him, be deemed to have been fulfilled.

This section may be compared with sec. 137 of the Indian Succession Act, with the exception that while the present section speaks of the fraud of a person "who would be directly benefited by the non-fulfilment of the condition" there are no corresponding words in the Succession Act.

This section may also be compared with sec. 18, Limitation Act.

144. Principle:—This section is based on the broad principle that no man is allowed to take advantage of his own wrong, and that relief is given to the party to whose interest it is that the condition should be fulfilled. See *Edwards v. Aberayron Mutual Insurance Society*, 1 Q.B.D. 563. Where the performance of a condition is rendered impossible by the fraud of a person, equity considers that as done which would have been done, and the person guilty of fraud is precluded from taking advantage of it—*Rooper v. Lane*, 6 H.L.C. 443. This rule is based on the principle of estoppel.

Fraud:—For definition of fraud, see sec. 17, Contract Act.

Election.

35. (1) Where a person professes to transfer property which he has no right to transfer, and, as part of the same transaction, confers any benefit on the owner of the property, such owner must elect either to confirm such transfer, or to dissent from it, and, in the latter case, he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultanpur is the property of C, and worth Rs. 800. A, by an instrument of gift, professes to transfer it to B, giving by the same

instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must, out of the Rs. 1,000, pay Rs. 800 to B.

(2) The rule in the first paragraph of the section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

(3) A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

(4) A person who, in his one capacity, takes a benefit under the transaction, may, in another, dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

(5) Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election or if he waives enquiry into the circumstances.

(6) Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

(7) Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to B an estate to which C is entitled, and as part of the same transaction, gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

(8) If he does not, within one year after the date of the transfer, signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

(9) In case of disability, the election shall be postponed

until the disability ceases, or until the election is made by some competent authority.

This section may be compared with secs. 180-182 and 184-190 of the Indian Succession Act, 1925.

145. Doctrine of Election:—Election is an obligation impliedly imposed on a party to choose between two inconsistent or alternative rights in a case where there is a clear intention of the grantor that the grantee should not enjoy both. The principle of election is this: He who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with them—*Streatfield v. Streatfield*, 1 W. & T.L.C. 397; Williams on Executors, 11th Ed., Vol. 2, page 1182. If a testator gives property, by design or by mistake, which is not in his power to give, and gives at the same time to the real owner of it other property, such real owner cannot take both—*Per James, V.C.*, in *Wollaston v. King*, 8 Eq. 165 (at p. 173).

The doctrine of election in equity originates in two inconsistent alternative donations or benefits, the one of which the pretending donor has no power to make, without at least the assent of the donee of the other benefit. In this quality of gifts, or pretended gifts, there is an intention which may be expressed, but which is more often implied, that the one gift shall be a substitute for the other, and shall take effect only if the donee thereof permits the other gift also to take effect, substantially in the manner and to the extent intended by the donor. The permitting donee has the right to choose; whence this head of equity is called “election”—Snell’s Equity (9th Edn.), p. 237.

The foundation of the doctrine of election is that the person taking a benefit under an instrument must also bear the burden—*Codrington v. Lindsey*, L.R. 8 Ch. 598; *Pickersgill v. Rodger*, 5 Ch. D. 163. To accept the benefit and at the same time to decline the burden is to frustrate the intention of the donor—Snell’s Equity, p. 238. A person cannot take *under* and *against* one and the same instrument—*Dillon v. Parker*, 1 Swan. 359. A legatee cannot take a legacy without submitting to the onerous condition of the will. Thus, if his property (a house) has been wrongly devised to another and the testator has made a devise of a sum of money in his favour, then if he wishes to receive the legacy, he must acquiesce in the devise of his house to another. If, however, he chooses to retain the house, he is not entitled to the legacy under the will—*Venkataramayya v. Patchamma*, 78 I.C. 274, A.I.R. 1925 Mad. 164 (166). Suppose A by will or deed gives to B a property belonging to C, and by the same instrument gives other property belonging to himself to C. A Court of Equity will hold C entitled to the gift made to him by A, only upon the implied condition of his (C’s) conforming to all the provisions of the instrument by renouncing the right to his own property given in favour of B; he must consequently make his choice, or as it is technically termed “he is put to his election,” to take *either under or against* the instrument. If he (C) elects to take under the instrument, he must relinquish in favour of B his property given to B by A, and take the property which is given to him by A.—Snell’s Equity, 9th Edn., p. 239.

146. Application of rule:—The doctrine of election is a rule of practice in equity—*Spread v. Morgan*, 11 H.L.C. 588; and being founded

on the highest principle of equity, it applies equally to Hindus and to persons governed by other personal laws. The principle is not peculiar to English law alone but is common to all law and based on the rules of justice, and has therefore been often applied by their Lordships of the Privy Council to the consideration of Indian cases—*Forbes v. Ameeroonissa*, 10 M.I.A. 340; *Shah Makhan Lal v. Baboo Kishen Singh*, 12 M.I.A. 186; see also *Mangaldas v. Ranchoddas*, 14 Bom. 438; *Bai Mamubai v. Dossa Morrarji*, 15 Bom. 443; *Tribhuvandas v. Smith*, 20 Bom. 316; and *Rajamannar v. Venkata*, 25 Mad. 361 in which the doctrine has been held applicable to Hindus.

Thus, D a Hindu widow died making a will in respect of property which she had inherited from her husband; she bequeathed Rs. 2,000 as a legacy to the plaintiff and the immoveable property to K. Both the plaintiff and K were the heirs of her husband. The plaintiff sued for the legacy under the will *as well* as for half the immoveable property as heir. *Held* that the plaintiff must be put to his election *either* to take the legacy under the will *or* half the property as heir—*Mangaldas v. Ranchoddas*, 14 Bom. 438.

The doctrine of election applies to all kinds of property and persons. There is no distinction for the purposes of election, between personal estate and real estate, between specific and residuary legatees, or between legatees and the next-of-kin of an estate—*Per Jones, L.J., in Cooper v. Cooper*, L.R. 6 Ch. 15.

It is applicable to moveable and immoveable properties alike—*Cooper v. Cooper*, L.R. 6 Ch. 15 (19).

The doctrine is applicable as well to vested as to contingent interests, to reversionary and remote as well as to the immediate interests—*Wilson v. Lord Townshend*, 2 Ves. J. 693 (697).

147. Donor's intention to give property not his own:—In order to raise a case of election it is necessary that the intention of the testator to dispose of the property which is not his own should be clear—*Rancliffe v. Parkins*, 6 Dow. 179. The doctrine of election does not apply where the testator has some present interest in the estate disposed of by him, though it is not entirely his own. In such a case, unless there is an intention clearly manifested in the will or a necessary implication on his part to dispose of the whole of the estate including the interest of third persons, he will be presumed to dispose of that which he might lawfully dispose of and no more—*Grissell v. Swinhoe*, L.R. 7 Eq. 291; *Wilkinson v. Dent*, 6 Ch. 339.

The intention must appear on the face of the will itself, for parol evidence will not be admissible for the purpose of showing it—*Stratton v. Best*, 1 Ves. 185; *Doc v. Chichester*, 4 Dow. 65; *Clementson v. Gandy*, 1 Keen. 309.

148. "Same transaction":—No case for election arises where the two gifts are not made in the *same* transaction. Thus, a Hindu widow made a gift in excess of her powers and subsequently left a will in the following terms: "Excluding the properties which I have already given away, I will make the following disposition." *Held* that the plaintiff taking under the will of the widow is not precluded from disputing the prior gift. A person accepting a benefit under a will is not precluded by the doctrine of election from disputing some *separate* transaction in which the testator was engaged long before his death and which is not the subject

of the will at all—*Ramayyar v. Mahalakshmi*, 42 M.L.J. 583, A.I.R. 1922 Mad. 357 (358); 64 I.C. 481.

149. Different nature of the two properties is no bar to election:—A, who was managing the properties inherited by the daughter of his deceased brother, died leaving a will whereby he bequeathed a portion of those properties to B, and a sum of Rs. 800 to his niece. In a suit brought by the niece to recover the properties inherited by her and bequeathed to B, and also the legacy of Rs. 800, *held* that the doctrine of election applied, notwithstanding that the niece would get an absolute right in the sum bequeathed to her, while B would take only her life interest in the properties bequeathed to him—*Ammalu v. Ponnammal*, 36 M.L.J. 507, 49 I.C. 527.

150. The benefit shall revert to the transferor:—If the transferee does not take according to the instrument, he must relinquish the benefit conferred upon him, and the benefit so relinquished shall revert to the transferor on the principle that it is impossible to ascertain what the testator would have done, if he were aware of the defect in his instrument. And the Court cannot speculate what would have been the transferor's intention under the circumstances—*Whistler v. Webster*, 2 Ves. 370; *In re Brookshank*, 34 Ch. D. 163. But the disappointed donee is entitled to take out of the benefit the value of the property attempted to be transferred to him.

There is a distinction between the English and the Indian Law as to the disposal of the balance after satisfying the disappointed donee. Under the English Law the balance goes to the refractory donee; whereas under the Indian law the balance goes to the transferor or his representatives. Thus in the first Illustration to this section, if C elects to retain the farm of Sultanpur, he forfeits the gift of Rs. 1,000, but B is entitled to get Rs. 800, the value of the property attempted to be transferred to him. The remaining Rs. 200 will go, according to Indian Law, to A or his representatives; but according to English Law, it will go to C. See *Dillon v. Parker*, 1 Swan. 394. Under the English Law, the refractory donee by electing against the instrument does not incur a *forfeiture* of the whole benefit conferred on him, but is merely bound to make *compensation* out of it to the disappointed transferee, and after making compensation, *takes the balance himself*. In other words *compensation* and not *forfeiture* is the principle on which the doctrine of election proceeds, under English law. Williams on *Executors*, (11th Edn.), Vol. II, pp. 1188, 1189.

Another point of difference between the English and the Indian Law is that when the donee does not take according to the instrument and relinquishes the benefit, the benefit under the Indian Law reverts to the transferor or his representatives, and the compensation to be paid to the disappointed transferee is a charge *upon the transferor* or his representatives; but under the English Law, the benefit relinquished by the donee does not revert to the transferor but remains in the hands of the donee, subject to the giving of a compensation to the disappointed transferee; in other words, the compensation to be given to the disappointed transferee is a charge *upon the refractory donee*. See *Pickersgill v. Rodgers*, 5 Ch. D. 163.

151. Clause (2):—"Whether the transferor does or does not believe":—The transferor's belief is immaterial. It is not necessary to prove that the transferor was aware that the subject of disposition was

not his own—*Coutts v. Acworth*, 9 Eq. 519. The obligation of making an election will be equally imposed on the transferee, although the transferor proceeded on an erroneous supposition that both the subjects of transfer were absolutely at his own disposal. Williams on *Executors*, Vol. II, p. 1182. The Court will not speculate on what the transferor would have done if he had known that the property was not his—*Whistler v. Webster*, 2 Ves. 367.

Clause (3):—Person taking benefit indirectly need not elect:—No case of election arises when a benefit is given indirectly. For a devisee or donee who claims derivatively through another does not take under the deed, and is not bound by the equity attaching thereto. Thus “the lands of Sultanpur are settled upon C for life, and after his death upon D his only child. A bequeaths the lands of Sultanpur to B and Rs. 1,000 to C. C dies intestate shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C’s estate to take under the will. In that capacity he receives the legacy of Rs. 1,000 and accounts to B for the rents of the lands of Sultanpur which accrued after the death of the testator, and before the death of C. In his individual character he *retains the lands* of Sultanpur in opposition to the will”—Illustration to sec. 184, Indian Succession Act, 1925.

152. Clause (4):—Person acting in different capacities:—Compare sec. 185 of the Indian Succession Act:—“A person who in his individual capacity takes a benefit under the will, may in another character elect to take in opposition to the will.

“*Illustration.*—The estate of Sultanpur is settled upon A for life, and after his death upon B. A leaves the estate of Sultanpur to D, and Rs. 2,000 to B, and Rs. 1,000 to C, who is B’s only child. B dies intestate shortly after the testator without having made an election. C takes out administration to B and, as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of Rs. 2,000. C may do this and yet claim his legacy of Rs. 1,000 under the will.”

Where a person takes a benefit in a capacity different from that in which he asserts his rights, no question of election can arise merely because owing to certain circumstances the two capacities have temporarily merged in him—*Deputy Commissioner v. Ram Sarup*, 20 O.C. 243, 42 I.C. 18.

153. Exception:—*Such benefit is expressed to be in lieu of that property:—*Where a Hindu testator in bequeathing all his property, included therein the share of his brother’s widow, but made a suitable provision for her maintenance, and the widow at first sued for and obtained the allowance for maintenance but subsequently sued for her share in her husband’s property, *held* that the second suit would be precluded with regard to the doctrine of election, as the widow must have known that the maintenance was provided for *in lieu* of her husband’s property—*Promoda Dasi v. Lakhi Narain*, 12 Cal. 60.

154. Clause (5):—Acceptance of the benefit amounts to election:—Acceptance of the benefit by the donee amounts to election. But in order to presume an election from the acts or conduct of any person, he must be shown (i) to have been aware of his right to elect, (ii) to have intended to exercise such right, and (iii) to have had full knowledge of such matters as the value of the different properties and his own rights in

respect of them, unless he has waved the inquiry which would have resulted in such knowledge. *Shephard and Brown*, 7th Edn., p. 110; *Briscoe v. Briscoe*, 1 Jo. & Lat. 334; *Wilson v. Thornbury*, L.R. 10 Ch. 239; *Worthington v. Wiginton*, 20 Beav. 67. Hence it follows that if a person acts through *ignorance* or *mistake*, the doctrine gives way. Thus, a holder of a mere life-estate granted a perpetual lease (which he had no right to grant), and the reversioner (plaintiff) accepted rent from the lessee for three years after the lessor's death. *Held* under sec. 35 that the mere acceptance of rent by the plaintiff did not constitute an election by him to confirm the lease, when there was nothing to show that he was aware of the circumstances under which the lease was granted or of the terms on which it was held by the person paying the rent. There can be no election when the person receiving the rent is not aware of his duty to elect or of the fact that a perpetual lease had been granted by the intermediate holder, which it was in his power to repudiate or confirm. Under these circumstances the acceptance of rent even for three years could not operate as an estoppel or waiver by the plaintiff of his right to avoid the lease—*Gopi Koeri v. Raj Roop*, 78 I.C. 191, A.I.R. 1925 All. 190 (192).

An election made under a misconception of the extent of the claims on the fund elected, may be revoked—*Kidney v. Coussmaker*, 12 Ves. 136; *Worthington v. Wiginton*, (*supra*); *Tribhovandas v. Smith*, 20 Bom. 316.

155. Clause (6):—Two years' enjoyment:—Acceptance of a benefit may be presumed from two years' enjoyment of the benefit. Thus, where a donee on her mother's death entered on the land and from that time continued in possession for two years, received the rents, made no application to the trustees to sell nor brought a bill against them to sell, though she had a right to apply to them to sell and as *cestui que trust* might have contracted for selling, *held* that such action raised a presumption of acceptance—*Crabtree v. Bramble*, 3 Atk. 680. But if a person acts in *ignorance* of his right, no presumption will be made in favour of acceptance even though the possession be for 2 years or more. Thus, where a person on whom a benefit has been conferred had been in receipt of the same for 16 years, being ignorant of his right to elect, *held* that he was not estopped from acting the other way—*Sopwith v. Manghan*, 30 Beav. 235.

If one or both of the two properties are reversionary, the period of two years will not begin to run before both fall into possession, for until then they cannot be enjoyed—*Padbury v. Clark*, 2 Mac. & G. 298.

Clause (7):—Election when parties cannot be placed status quo:—Election will be presumed when the donee has acted in respect of the property gifted to him in such a manner as to make it impossible for him to return it to the true owner in the same position in which it had remained before. See the illustration. This is based on the principle of English law that a contract cannot be avoided where it has become impossible for the parties to be placed in the same position as if it never had been made—*Shephard and Brown*, 7th Edn., p. 110.

156. Clause (8):—Time for election:—The Indian law specifies a time within which an election must be made. In England no such time is fixed by law, but if a time is limited by the instrument itself, the donee must elect within that period, and if he fails to do so he will be deemed

to have renounced the benefit under the instrument—*Dillon v. Parker*, 1 Swan. 385.

157. Clause (9):—Disability:—The last para. of this section corresponds to section 190 of the Indian Succession Act, 1925.

In the case of a minor the period of election will be postponed during the minority, unless the minor is represented by a qualified guardian, in which case he can elect.

Apportionment.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends, and other periodical payments in the nature of income, shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of periodical payments on determination of interest of person entitled.

This section may be compared with secs. 338-340 of the Indian Succession Act, 1925. The English law on the subject is embodied in the Apportionment Act of 1870 (33 & 34 Vict. c. 35).

158. Scope of Section:—This section is applicable only as between the transferor and the transferee of the benefit of the payment, and not as between the person liable for and the person entitled to the payment—*Rangappaya v. Shiva*, A.I.R. 1933 Mad. 699 (700). Thus, this section has no application as between landlord and tenant—*Janki Bai v. Bayabai*, 16 C.P.L.R. 55. Therefore, if a landlord dispossesses his tenant in the middle of the year, he does not thereby in all cases forfeit his right to rents which have already accrued due. Whether he does or not must depend upon the circumstances, *e.g.*, if it be an agricultural tenure, the question would be whether the raiyat has enjoyed all the year's profits or has been prevented from enjoying any by the landlord's act of interference—*Bunsee Dhur v. Bheem Lal*, 24 W.R. 219.

Again, the apportionment which this section contemplates is one following upon the transfer of the interest of the person *entitled to receive* the rent and not upon the transfer of the interest of the person *bound to pay* it—*Satyendra v. Nilkantha*, 21 Cal. 383 (386).

This section applies only in the absence of a *contract to the contrary*. Where the contract shows that the whole rent for the year accrues on a fixed date in the year, it cannot be said that the rent accrues from day to day; consequently it is a contract to the contrary of what is enacted in sec. 36, T. P. Act, and that section cannot apply to the case—*Subbaraju v. Seetharamaraju*, 39 Mad. 283 (287), 28 I.C. 232. But the Allahabad High Court holds that sec. 36 applies even though under a special custom the rents or profits become due on a particular day of the year and not from day to day, because section 36 speaks of a proportionate division of the profits, and does not affect the date when they become due from the tenants. That date remains as of before. Sec. 36 expressly lays down that

on a transfer of an interest the rents, etc., shall as between the transferor and the transferee accrue from day to day and be apportionable accordingly but shall be *payable on the days appointed for the payment thereof*—*Lala Ganga Ram v. Mewa Ram Singh*, A.I.R. 1922 All. 275. Suppose a house fetching monthly rent is sold on 10th of May. The seller would, in the absence of a contract to the contrary, be entitled to the rent of 9 days, and the vendee to the rent of 22 days. But the tenant holds under a monthly contract, and he cannot be made to pay the rent of 9 days to the seller on the 10th of May. He will pay the rent as usual on the 1st of June. But he will pay in the proportion indicated”—Mukherji's *Law of Transfer of Property*, 2nd Edn., p. 48.

Moreover, this section is confined to transfers by act of parties, and does not apply to transfers by operation of law, *e.g.*, execution sales—*Satyendra v. Nilkantha*, 21 Cal. 383. (386); *Subbaraju v. Seetharamaraju*, 39 Mad. 283 (286). Even this section does not apply to transfers by operation of customary law. Thus, where according to custom the eldest son having succeeded to the Raj estate, the second son (plaintiff) became *hikim* entitled to certain customary property, and claimed refund of rent for 55 days up to the end of a *fasli* year from the first defendant who as mortgagee in possession of certain *mouzas* held under the plaintiff's predecessor had personally collected from the tenants of the *mouzas* the entire rent for the *fasli* year, *held* that having regard to sec. 2 (which prohibits the Transfer of Property Act from applying to transfers by operation of law), this section did not apply to the case, and that the claim was not maintainable—*Mathewson v. Shyam Sundar*, 33 Cal. 786. But in Madras the principle of this section (though not the section itself) has been applied to a transfer by *execution sale*, on the ground of equity and good conscience—*Lakshminaranappa v. Melothraman*, 26 Mad. 540. In this case, certain lands had been leased out at yearly rent, payable in two half-yearly instalments, by the person having a life-interest therein. The interest of the lessor in the lands was sold in execution of a decree, and purchased by the plaintiff at Court-sale. The lessor died on the 26th of the month at the end of which the first half-yearly rent was payable. The plaintiff now sued to recover as much of the rent as was due up to the date of the death of the lessor. *Held* that he was entitled to recover. In the absence of a special rule applicable to cases like this, the Indian Courts are entitled to follow the broad and just principle underlying the English Apportionment Act, 1870 (which principle has been recognised in the Indian Transfer of Property Act, section 36) and to hold that as a matter of equity and good conscience the assignee of the tenant for life was entitled to an apportionment of the rent due up to the date of the death of the tenant for life (*per* Subramania Iyer, J.). In another Madras case also it has been held that although this section does not apply to sales in execution (*vide* section 2) yet this section embodies a rule of justice, equity and good conscience which should be applied in case of apportionment of rent between the original lessor and the purchaser of his interest in execution at a Court sale—*Rangiah Chetty v. Vajravelu*, 41 Mad. 370, 33 M.L.J. 618, 43 I.C. 78. In an Allahabad case, the principle of this section has been applied to the case of a suit for profits brought by a co-sharer against the *lambardar*; and it has been held that the date fixed for the payment of the profits does not imply that the right to a share in the income does not vest till the arrival of the date, but the profits accrue

from day to day and become vested in the co-sharers, although the time for payment is postponed for the sake of convenience till the date fixed—*Mohammad Abdul Jalil v. Mohammad Abdus Salam*, 1932 A.L.J. 93, 137 I.C. 166, A.I.R. 1932 All. 178 (181).

Apportionment:—The expression 'apportionment' is used in two senses—(1) to denote distribution of a common fund among the several claimants; and (2) to denote the contribution made by several persons having distinct rights to discharge a common burden—Story's *Equity Jurisprudence* (2nd Edn.), p. 305. It is in the first sense that the word is used in this section.

159. Rents:—Under this section, in the absence of a contract or local usage to the contrary, all rents shall, upon the transfer of the interest of the person entitled to collect them, be decreed as between the transferor and transferee to accrue due from day to day, and to be apportionable accordingly though they are payable on the days appointed for the payment thereof. Thus, where a transfer of property took place on the 24th Falgoun 1922, the transferee would be entitled to the rents accruing *after*, and not *before*, that date, although the rents from Magh to 24th Falgoun, being included in the *Chait Kist*, would be payable in *Chait*. The *Chait Kist* must be deemed to accrue from day to day and to be apportionable accordingly—*Aparna Devi v. Sree Shiva Prasad*, 3 Pat. 367 (371). Similarly where the plaintiff purchased the property on the 20th February 1919, and the question arose as to who should get the Rabi rent falling due on the 1st May, 1919, *held* that the rights of the transferor and the transferee should be determined on the basis of the total Rabi rent and the number of days in the Rabi season, the transferor being given credit for a proportion of the Rabi rent based on the number of days which fell within the period of his lawful possession, and the transferee being credited with a share of the Rabi rent based on the number of days between the date of his purchase and the date on which the Rabi rent fell due—*Nand Kishore v. Ram Sarup*, 50 All. 18, 25 A.L.J. 770, A.I.R. 1927 All. 569, 102 I.C. 144. The Rangoon High Court has expressed an opinion that agricultural rents are not apportionable, for they accrue once and for all at the time the crops are reaped and do not accrue from day to day, and hence there can be no question of apportionment—*Ma Hawa v. Sein Kho*, 5 Rang. 803, A.I.R. 1928 Rang. 67 (68), 109 I.C. 191.

An assignee of a lease from a lessee can claim as against the lessor an apportionment of rent accruing due after the date of the assignment to him according to the period before and after the assignment, and the rent can be deemed accruing from day to day as between him and the lessor—*Kunhisou v. Mullohi*, 38 Mad. 86 (89).

Where an assignee from a tenant of his interest subsequently gets an assignment of the interest of the landlord, the assignor of the landlord's interest is entitled to the rents accrued up to the date of the assignment, from the assignee, on the principle of this section—*Bikram Kumar v. Mohit Krishna*, 64 I.C. 178 (Cal.).

An apportionment of rent due in respect of several villages should not be on the basis of the assets of the different villages at the time of the creation of the original tenure, but on the basis of the present assets of the different portions of the tenure which by division have passed into different hands—*Hari Kishan v. Tilukdhari*, 7 C.W.N. 453 (454).

160. Dividend:—According to the definition given in the English Apportionment Act, 1870 (33 & 34 Vict., C. 35), the word 'dividend' includes all payments made by the name of dividend, bonus, or otherwise, out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed time or otherwise; but this does not include payments in the nature of a return or reimbursement of capital. Such payments would be excluded by this section also, because they are not "periodical payments in the nature of income."

The term 'dividend' includes occasional bonuses or surplus profits of shareholders—*Carr v. Griffith*, 12 Ch. D. 655. Dividends out of profits from time to time declared by a commercial company are apportionable—*Hartley v. Allen*, 27 L.J. Ch. 621.

161. Other periodical payments:—The expression "other periodical payments" can only refer to payments *ejusdem generis* with rents, annuities, pensions and dividends—*Gobind Rao v. Bhagirathi*, 14 C.P.L.R. 84. They must be payments which are made periodically, recurring at fixed times not at variable periods, nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation; and further, they must be *in the nature of income*, that is, coming in from some kind of investment—*Jones v. Ogle*, L.R. 8 Ch. 192, 198. It has been held that the profits of a private partnership regulated by a deed under which the accounts are made up in January of each year and the profits are divisible among the partners by four instalments, are not periodical payments in the nature of an income, but are in reality payments of a different nature, in as much as those profits only accrue after the adjustment of the account, and cannot be presumed to be made *from day to day*—*Jones v. Ogle*, 42 L.J. Ch. 334.

The profits derived from a share in a village are not apportionable in the manner indicated by Sec. 36 of the Transfer of Property Act. There is one very obvious reason why such profits cannot be apportioned. The accounts for the year might show a deficit to which each co-sharer would be liable to contribute, and as no portion of the loss could be recovered from a co-sharer who had assigned his share before the end of the agricultural year, the result of applying the rule of apportionment directly would contravene the maxim that he who derives the advantage ought also to sustain the burden—*Gobind Rao v. Bhagirathi*, 14 C.P.L.R. 84 (86).

162. Accrue from day to day:—In Bengal rent is not ordinarily regarded as accruing from day to day but as falling due at stated periods according to the contract of the tenancy, or, in the absence of such contract, according to the general law as laid down in sec. 53 of the Bengal Tenancy Act—*Satyendra Nath v. Nilkantha*, 21 Cal. 383 (385); *Satya Bhupal v. Rajnandini*, 28 C.W.N. 1039, A.I.R. 1924 Cal. 1069, 83 I.C. 144.

In Madras it has been held that rent should be deemed to accrue from day to day. "In England the law of apportionment has been regulated by statutes, and all rents, like interest on money lent, are considered as accruing from day to day and apportionable in respect of time accordingly. In India, there is no reason for not applying to rent the principle adopted in England in the case of interest"—*Kunhisou v. Mulloli*, 38 Mad. 86 (91).

37. When, in consequence of a transfer, property is divided and held in several shares, and ^{Apportionment of benefit of obligation on severance.} thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed, and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Local Government, by notification in the Official Gazette, so directs.

Illustrations.

(a) A sells to B, C and D, a house situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase money, and C and D one quarter each. E having notice of this must pay Rs. 15 to B, Rs. 7½ to C and Rs. 7½ to D, and must deliver the sheep, according to the joint direction of B, C and D.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all according to such direction as B, C and D may join in giving.

Compare section 30 of the Easements Act (V of 1882).

164. Rent:—Where in consideration of a patni tenure granted by the landlords, the patnidar has undertaken to pay year by year into the Collectorate a certain sum to be credited to the Government revenue payable by the landlords, the yearly sum is one payable in consideration of the patnidar's use and occupation of the land, and though payable into the hands of the Collector, is agreed to be paid on account and to the credit of the landlords; and therefore it is *rent* paid to the landlords, and it can be apportioned as between the several landlords—*Gour Gopal v. Gosta Behari*, 21 C.W.N. 214 (216), 34 I.C. 409.

165. Notice:—The proviso lays down that the person on whom the burden of obligation lies is saved from liability until he has had

reasonable notice of the severance. Compare sec. 50; as well as sec. 109 which applies the principle embodied in secs. 37 and 50 to leases. The notice here mentioned may be given either by the assignor or by the assignee, and not necessarily by the assignor. It is immaterial whether the notice of the assignment was received by the tenant from the assignor or from the assignee. When a tenant pleads payment to the assignor, the Court has to consider upon all the circumstances of the case, whether the payment alleged to have been made by him was *bona fide*. If he has made the payment with notice, actual or constructive, of the assignment, he cannot escape liability merely by proof that the notice received was from the assignee and not from the assignor—*Peary Lal v. Madhoji*, 17 C.L.J. 372, 19 I.C. 865 (868). The tenant cannot successfully plead that he has paid the rent *bona fide* to the assignor, if he has received notice of the assignment from the assignee, see *Pope v. Biggs*, (1829) 9 B. & C. 245, 32 RR. 665; *Rogers v. Humphreys*, (1835) 4 A. & B. 299, 43 R.R. 340.

166. Where section does not apply:—This section does not apply where the indivisible character of the property is kept up on a transfer (by inheritance). Thus, on the death of a creditor, his numerous heirs are only *jointly* entitled to enforce the right which the deceased creditor, if alive, could singly enforce, and no question of apportionment can arise—*Ahinsa Bibi v. Abdul Khader*, 25 Mad. 26 (33). The English Law in this respect is the same. “The authorities all agree that whatever be the number of parceners, they all constitute one heir. They are connected together by unity of interest and unity of title; and one of them cannot distrain without joining the others in the avowry. If they cannot distrain separately, how can they separately claim a portion of the rent? In as much as there has been no division of those rents, nor any agreement by the defendant to hold one-third of them separately for the plaintiff, he has no right separately to sue the defendant”—*per* Tindal, C.J., in *Decharms v. Horwood*, 10 Bing. 526, cited in 25 Mad. 26 (34).

167. Agricultural leases:—Agricultural leases have been exempted from the operation of this section for it would otherwise cause great hardship to agriculturists.

The Madras High Court has held that though sections 37 and 109 may not directly apply to agricultural leases in the Madras Presidency, the principles embodied in these sections ought to be followed by Indian Courts, and that under the principles of law embodied in those sections, the tenant is bound to pay to each of the owners his proportionate share of the rent, where in consequence of a transfer the property is held in separate shares—*Sri Raja Simhadri Appa Rao v. P. Ramayya*, 29 Mad. 29 (36).

(B).—Transfer of Immoveable Property.

38. Where any person, authorised only under certain circumstances to transfer, transfers by person authorised only under certain circumstances to transfer, of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any)

affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance and that the sale of the field is necessary; and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

168. Application of section:—This section embodies the principle deducible from the cases decided with reference to Hindu Law, especially the case of *Hunooman Persaud Pandey v. Babooee Munraj Konweree*, 6 M.I.A. 393; and the rule enacted in this section has long been recognised in this country. This section is intended to apply to Hindus, as the illustration shows—*Dalibai v. Gopibai*, 26 Bom. 433; *Shri Beharilalji v. Bai Rajbai*, 23 Bom. 342; *Ramanadhan v. Rangammal*, 12 Mad. 260 (F.B.); *Soorja Koer v. Nath Baksh*, 11 Cal. 102; *Ram Kunwar v. Ram Dai*, 22 All. 326. And it is clearly applicable to Mahomedans also.

This section presupposes an *actual* transfer for consideration and has no application where the transaction is still incomplete—*Jamsetji v. Kasi-nath*, 26 Bom. 326; *Jugmohan v. Pallonjee*, 22 Bom. 1 (10).

It is only in the case of *immoveable* property and in the case of a person having only a *restricted right* to transfer such immoveable property that any considerations as to reasonable inquiries, etc., on the part of the purchaser are at all relevant and material under sec. 38 of the T. P. Act. In the case of moveable property, provided the vendor has got the power to give a good title and the vendee pays consideration, the vendor has absolute power to give such title to the purchaser. The fact that the vendor professes to exercise that right and power reciting false state of facts, cannot affect the vendee—*Subramania v. Krishna*, 39 M.L.J. 590, 60 I.C. 77 (80).

169. "Persons authorised under circumstances variable":—The expression "circumstances variable" includes such circumstances as constitute legal necessity, and which vary according to the status of the person and other surrounding circumstances. The persons meant by the expression are persons having a limited power to transfer; thus, the karta of a family, a Hindu widow, the guardian of a minor, a trustee, an executor, a mortgagee, and other persons having a limited power of sale, are "persons authorised to dispose of immoveable property only under circumstances in their nature variable." See *Hunooman Persaud Pandey's* case, 6 M.I.A. 393.

170. Inquiry into circumstances necessitating transfer:—When a transferee takes a transfer from a person who is entitled to transfer property only under "circumstances in their nature variable," that is, whose power of transfer is limited and qualified, it is the duty of the transferee to ascertain by inquiry whether the circumstances necessitating the transfer

do exist. Thus, where a creditor is endeavouring to establish a claim under a hypothecation bond, given by a Hindu father having a limited interest, against his son, the Courts will require proof on the part of the creditor, that before he entered into the transaction he at least made reasonable inquiries as would satisfy a prudent lender that the money was required to pay off an antecedent debt, or for the legal necessity of the family—*Maharaj Singh v. Balwant Singh*, 28 All. 508. Where a person claims title under a conveyance from a Hindu woman who is a limited owner, and seeks to enforce his right against the reversioner, he must prove that the conveyance was genuine, that the lady had full knowledge, and that the alienation was for necessity or that he was satisfied of the necessity upon reasonable inquiry—*Bhagwat v. Debi Dayal*, 35 Cal. 420 (P.C.).

This section lays down that if the transferee has taken reasonable care to ascertain the existence of the circumstances alleged by the transferor as necessitating transfer, those circumstances shall be presumed to exist. In other words, "the actual existence of the circumstances is not a condition precedent to the validity of the alienation. It is enough if the alienee, being a purchaser for value, has taken reasonable care and has honestly satisfied himself of their existence"—Shephard and Brown, 7th Edn., p. 116. If a purchaser, before embarking on transactions with a Hindu widow has made reasonable and *bona fide* inquiries and has satisfied himself to the best of his knowledge and belief that legal necessity exists, the real existence of such legal necessity in point of fact is not a condition precedent to the success of the purchaser. This principle is laid down in sec. 38, T. P. Act—*Shankar Rao v. Pandurang*, 9 N.L.J. 22, 92 I.C. 646, A.I.R. 1927 Nag. 65 (66).

171. Limits of the inquiry:—It has been stated by the Judicial Committee in *Hunooman Persaud Pandey's case* (6 M.I.A. 393 at pp. 419, 420) that the creditor (*i.e.*, the mortgagee) may rely on the representations made by the borrower (mortgagor), and that the representations made by the borrower are not merely evidence of the existence of circumstances necessitating the loan, but are sufficient to discharge the burden which rests upon the creditor of showing a reasonable inquiry as to the binding nature of the purpose for which the loan is contracted. But sec. 38 of the Transfer of Property Act seems to require something more; it requires a reasonable care on the part of the transferee in ascertaining the existence of the circumstances alleged by the transferor of immovable property. However, it may be laid down that the inquiry required from the lender should not be limited to the representations of the borrower. Something more than the mere representation of the borrower is necessary to constitute reasonable inquiry on the part of the lender—*Maharaja of Bobbili v. Zamindar of Chundi*, 35 Mad. 108 (112). Thus, where the purchaser of immovable properties from a Hindu widow did not enquire from the creditors mentioned in the sale-deed (who were to be paid off out of the consideration money) as to the necessities of the transaction, but satisfied himself with an enquiry merely from the widow herself, and it was found that the statement regarding the payment to the alleged creditors was false, *held* that the purchaser had not made the necessary inquiry and the sale could not be supported—*Janhabi v. Balbhadra*, 15 C.W.N. 793 (795), 10 I.C. 350. This section directs the transferee from a limited owner of property to act with reasonable care and good faith and

to satisfy himself by an inquiry as to the existence of the legal necessities of the transfer, and that the transfer was in the particular instance for the benefit of the estate. If he does so, he is safe; but he is not bound to *see to the application of the money*—*Hunooman Persaud v. Babooee*, 6 M.I.A. 393; *Uday Chundur v. Asutosh*, 21 Cal. 190; *Dalibai v. Gopibai*, 26 Bom. 433; *Ghansham v. Badiya*, 24 All. 547 (548). Nor is it necessary that the lender should ascertain that every pice of the money advanced by him is required for legal necessity—*Ghansham v. Badiya*, *supra*. Moreover where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred on the estate in the particular instance is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his favour against the heir, grounded on a necessity which his own wrong has helped to cause—*Hunooman Persaud v. Babooee Munraj*, 6 M.I.A. 393 (at p. 424).

Inquiry when unnecessary:—If the sole person who has title or interest to challenge the validity of the transfer has made representations, or induced a belief by his conduct in the purchaser that the transaction was unobjectionable, the inquiry may be dispensed with—*Sarat Chunder v. Gopal Chunder*, 20 Cal. 296.

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee if he has notice of such intention, or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Transfer
where third
person is
entitled to
mainten-
ance.

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property and such property is transferred * * * the right may be enforced against the transferee if he has notice *thereof*, or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Transfer
where third
person is
entitled to
mainten-
ance.

Illustration.

A, a Hindu, transfers Sultanpur to his sister-in-law B in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's

(Omitted).

property, and agrees with her that, if she is dispossessed of Sultanpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith without notice of the agreement. B is dispossessed of Sultanpur. She has no claim on the villages transferred to C.

Amendment:—This section has been amended by sec. 11 of the Transfer of Property Amendment Act (XX of 1929). The words “with the intention of defeating such right” have been omitted; the words “of such intention” have been substituted by the word “thereof”; and the Illustration has been omitted. This Amendment has been made in accordance with the opinion expressed by Beaman J. in *Yamnabai v. Nanabhai*, 12 Bom.L.R. 1075, 8 I.C. 1057.

“Section 39 is intended to protect persons who are entitled to receive maintenance or for whom provision is made for advancement or marriage from the profits of any immoveable property. The section provides that such a right can be enforced against a transferee of the property, if the transfer has been made with the intention of defeating the right and the transferee has notice of the intention. The Courts have, therefore, always required proof of the intention on the part of the transferor and also of notice of the intention to the transferee. (I.L.R. 22 All. 326, 24 All. 160). The illustration to the section is not consistent with the section itself and does not make any reference to the intention of the transferor. In actual practice it is impossible to adduce proof of mere intention. As stated in 12 Bom.L.R. 1075 at pp. 1077 and 1078, in order to enable such proof to be adduced, a transferor must have announced his fraudulent intention of defeating the rights of persons entitled to maintenance and the transferee must have heard him doing so. As it is desirable to protect persons entitled to maintenance or for whom provision for advancement has been made from improvident holders of the property, it is necessary that the reference to the transferor’s intention should be omitted from the section, and the section should be amended accordingly.”—*Report of the Special Committee* (1927).

The Illustration has been omitted by the *Select Committee* (1929) as it is “misleading.”

173. Object and scope of section:—The object of this section, so far as it relates to maintenance, is to declare in what cases a right of maintenance may be enforced against transferees of the property from which the maintenance is recoverable—*Ram Kunwar v. Ram Dai*, 22 All. 326 (328).

The right protected by this section is a right of *maintenance*; but the claim of a Hindu widow to *reside* in the family house stands much on the same footing as a claim for maintenance and can be claimed against a purchaser *with notice* of the claim for residence—*Yamnabai v. Nanabhai*, 12 Bom.L.R. 1075, 8 I.C. 1057 (1058); but not where the property is sold to pay off her husband’s debt. See *Jayanti Subbiah v. Alamalu*, 27 Mad. 45 (51).

174. Essentials of this section:—Under the old law, in order that the right of maintenance might be enforced against the transferee, two things were necessary, *viz.*, (1) the transfer must have been made with the *intention of defeating* the maintenance-holder's right, and (2) the transferee had *notice of the intention*, or the transfer was gratuitous. Under the *present law*, all reference to the transferor's intention has been omitted, and it is sufficient if the transferee has notice of the maintenance-holder's right, or if the transfer is gratuitous.

Old Law:—*Intention to defeat the maintenance-holder's right:*—Under the old section, an essential condition for the enforcement of the right of maintenance against a transferee was that the transfer must have been made with the intention of defeating the right; that is, the transferor must have acted in fraud of the person entitled to the right. This right could not be equitably enforced against a transferee for value unless the transfer was made in fraud of the right of maintenance—*Ram Kunwar v. Ram Dai*, 22 All. 326 (328); *Bharatpur State v. Gopal Dei*, 24 All. 160 (163); *Mohini Debi v. Purna Sashi*, 36 C.W.N. 153 (157). Where a transfer was made with the *intention* of defeating the right of the person entitled to maintenance, and the transferee had *notice* of it, he could not defeat that right although he might be a transferee for valuable consideration—*Ram Kunwar v. Ram Dai*, 22 All. 326 (328); *Abu Mahomed v. Saraswati*, A.I.R. 1926 Cal. 1068, 43 C.L.J. 604, 97 I.C. 194. The main question was whether the vendor was acting in *fraud* of the widow's claim to maintenance. If the heir sought to defraud her and the vendee purchased with the knowledge that the transaction was one originating not in an honest desire to pay off debts or to satisfy claims for which the estate was justly liable but in a desire to shuffle off a moral and legal liability, he would as sharing in the proposed fraud be prevented from gaining by it—*Lakshman v. Satyabhamabai*, 2 Bom. 494 (525).

The words "intention of defeating such right" involved the idea of a *fraudulent* intention to deprive the maintenance-holder of her right and of bad faith in the transaction—*Digambari v. Dhankumari*, 10 C.W.N. 1074 (1079). Where a vendor recited in a sale-deed that he would pay the maintenance himself to the widow who was entitled to receive the same from the profits of the property, and that the property sold would not be subject to any charge for it, it was necessary for the Court to enquire whether at the time of sale there was sufficient property left in the hands of the vendor out of which the amount of maintenance could be realised, and if there was not, whether the vendee was aware of the fact. If the parties knew that there was not sufficient property then left in the hands of the vendor from the profits of which the maintenance could be realised, the conveyance was clearly made with the intention of defeating the right of maintenance—*Digambari v. Dhan Kumari*, 10 C.W.N. 1074 (1080); *Abu Mahomed v. Saraswati*, 43 C.L.J. 604, A.I.R. 1926 Cal. 1068, 97 I.C. 194. Where there was ample estate out of which to provide for the widow, so that she might still get her claim fixed and secured, no imputation of bad faith or of abetting it could be made against the purchaser of a portion of the joint property—*Lakshman v. Satyabhamabai*, 2 Bom. 494; *Digambari v. Dhan Kumari*, 10 C.W.N. 1074 (1078).

Old Law:—*Notice of fraudulent intention:*—The mere circumstance that the purchaser had notice of the *claim* for maintenance was not

sufficient under the old section to bind the property in his hands—*Lakshman v. Satyabhamabai*, 2 Bom. 494; it had further to be established that the purchaser had *notice of the intention* of the transferor to defeat the maintenance-holder's claim—*Abu Mahomed v. Saraswati*, 43 C.L.J. 604, 97 I.C. 194, A.I.R. 1926 Cal. 1068; *Mohini Debi v. Purna Sashi*, 36 C.W.N. 153 (157). Where the heir sought to defraud the widow and the purchaser was acting with *notice* not merely of her *claim* but of this fraud which was being practised upon her claim, the claim could be enforced against the estate in the hands of the purchaser. As West J., observed: "What was *honestly* purchased is free from her (widow's) claim for ever. What was purchased in *furtherance of a fraud upon* her or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first"—*Lakshman v. Satyabhamabai*, 2 Bom. 494 (500). If a fraudulent intention on the part of the transferor was found to exist in the case, there could be no question that the transferee, if he had *notice of such intention*, could not take the property except as subject to the liability of making good the maintenance out of the property in his hands—*Digambari v. Dhan Kumari*, 10 C.W.N. 1074 (1079). Where a large part of the property was sold *with the object of defeating the widow's* claim to maintenance, the purchaser having *knowledge of the fraud*, the widow's right to recover maintenance attached to the property in the hands of the purchaser, *although there might be other property* from which the widow's claim could be satisfied—*Sri Beharilalji v. Bai Rajbai*, 23 Bom. 342.

Present Law:—Under the present section as amended, the above decisions are redundant. The only thing to be now considered is, whether the transferee had *notice of the right of maintenance*. If he had notice of the right, the property passing to his hands would be liable, and it is immaterial whether the transferor had any fraudulent intention, and whether the transferee had notice of such intention. If, however, the transferee had notice of such intention, the case would be stronger against him. See *Lali Jan v. Md. Shafi*, 34 All. 478 (480) where it has been held that if the transferee has notice of the condition regarding the payment of maintenance, he is bound by it, although he is a transferee for valuable consideration.

Notice of right of maintenance:—Under the old section, it was held that where a transfer was *not made with the object* of defeating the right of maintenance, the right could not be enforced against the transferee *although he had notice* of such right—*Ram Kunwar v. Ram Dai*, 22 All. 326 (328); *Bharatpur State v. Gopal Dei*, 24 All. 160 (163); *Digambari v. Dhan Kumari*, 10 C.W.N. 1074 (1079). These rulings are no longer good law. It was further held that if the purchaser had notice of the widow's existence and of her claim for maintenance and yet purchased with the rational and honest opinion that the transaction was one originating in an honest desire to pay off debts or satisfy claims for which the estate was justly liable, the purchaser would acquire a title free from the widow's claim—2 Bom. 494 (524). This decision is no longer correct.

Where the transfer is for consideration and the transferee has *no notice of the right of maintenance*, it cannot be enforced against him, even though the transfer was made with the intention of defeating the right—*Ram Kunwar v. Ram Dai*, 22 All. 326. Given a right to recover main-

tenance from the profits of immovable property, and given a transfer made with the object of defeating that right, the only transferee who can defeat the right is a transferee for value *without notice of the right*—*Ibid* (at p. 328).

Gratuitous transfer:—If the transfer is gratuitous, the transferee can in no case defeat the right—*Ram Kunwar v. Ram Dai*, 22 All. 326 (328).

175. Maintenance—charge—decree:—This section deals with *personal* rights, and has no application to cases where such rights arise out of a specific charge on immovable property—*Razia Begam v. Ishrat*, 6 O.W.N. 493, 117 I.C. 405, A.I.R. 1929 Oudh 316 (318); *Fateh Ali v. Gobardhan*, 5 Luck. 172, A.I.R. 1929 Oudh 316 (318).

The maintenance of a Hindu widow is not by itself a *charge* upon the estate of her deceased husband unless it is fixed and charged upon the estate by a decree or by an agreement—*Bharatpur State v. Gopal Dei*, 24 All. 160 (163); *Ram Kunwar v. Ram Dai*, 22 All. 326 (327); *Yamnabai v. Nanabhai*, 12 Bom.L.R. 1075, 8 I.C. 1057; *Gajadhar v. Khula Kunwar*, 12 O.C. 37, 1 I.C. 690; *Brij Raj v. Ram Dayal*, 7 Luck. 411, 8 O.W.N. 1291, A.I.R. 1932 Oudh 40 (42); *Sowbagia v. Manika*, 33 M.L.J. 601, 42 I.C. 975; *Daulat v. Champa*, 55 I.C. 28 (Lah.); *Lakshman v. Satyabhamabai*, 2 Bom. 494. If the right to maintenance is *charged* upon a property, the purchaser having taken the conveyance subject to such charge would be bound to pay the maintenance—*Digambari v. Dhan Kumari*, 10 C.W.N. 1074 (1077). Where a charge is created, it would bind the immovable property even in the hands of a transferee *for consideration* and *without notice*. Sec. 39 would not apply to such a case—*Razia Begam v. Ishrat*, *supra*; *Fateh Ali v. Gobardhan*, *supra*. Where the maintenance has been specifically charged on the property transferred, it would be liable, although it be shown that there is other property in the hands of the transferor or his heirs sufficient to meet the claim—*Sham Lal v. Banna*, 4 All. 296. It should be noted that an agreement, in order to create a charge on the property, must be such as to make a property security for the payment of maintenance; if no particular or specific property is mentioned as liable for the claim for the maintenance, the agreement cannot create a charge on any property—*Mohini v. Purna Sashi*, 36 C.W.N. 153 (155, 157), A.I.R. 1932 Cal. 451. If the contract creating the right to receive maintenance out of the profits of a village is unregistered, there can be no charge on the property and the right to receive maintenance cannot be enforced against a subsequent transferee for value without notice—*Kesho Prasad v. Bank of Upper India*, 9 O.W.N. 1037, A.I.R. 1933 Oudh 76.

If the transferee had notice of the right of maintenance, he would be bound by the condition, and it is immaterial that the property was not charged with the payment of maintenance—*Lali Jan v. Muhammad Shafi*, 34 All. 478 (480).

If the right to maintenance has been merged in a *decree* and the decree directs that certain property is charged with the maintenance, a transferee of such property for consideration and even without notice is not entitled to protection, because the decree declaring the charge operates as a notice of the claim to the transferee. In such a case, sec. 39 would have no operation—*Kuloda v. Jageshar*, 27 Cal. 194; *Ram Kunwar v. Ram Dai*, 22 All. 326 (327); *Maina v. Bachchi*, 28 All. 655 (657). So long as a person

has a mere right of maintenance, sec. 39 applies; but as soon as she gets in lieu of her right of maintenance a *decree* fixing a definite sum and charging a specific property with payment thereof, what was previously a mere right of maintenance becomes a right of a quite different nature, and sec. 39 no longer applies. The right created by the decree is enforceable against bona fide transferees for value without notice—*Maina v. Bachchi*, supra. But a mere money-decree (which creates no charge upon the property) will not have this effect—*Beer Chunder v. Nobodeep*, 9 Cal. 535; *Lakshman v. Satyabhamabai*, 2 Bom. 494; *Adhiranee v. Shona Malee*, 1 Cal. 365.

176. Sale of property for necessity:—If a property is sold for purposes which authorise the sale, (*e.g.* for legal necessity) the purchaser takes a good title free from the widow's claim for maintenance—*Gur Dayal v. Kaunsilla*, 5 All. 367; *Soorjo Koer v. Nath Buksh*, 11 Cal. 102 (105); *Yamnabai v. Nanabhai*, 12 Bom. L.R. 1075, 8 I.C. 1057 (1058); *Lakshman v. Satyabhamabai*, 2 Bom. 494. The property in the hands of the purchaser will not be liable for maintenance, if the transfer was made to satisfy a claim for which the ancestral property is liable by Hindu law, and which under that law takes precedence over that of maintenance—*Sham Lal v. Banna*, 4 All. 296. In the absence of any specific charge on the family estate as to the future maintenance of a widow, the sale of ancestral property by the heir in possession for discharging the valid debts of the widow's late husband (or of her husband's father or grandfather) is valid, and the *bona fide* purchaser for value is not affected although he may have had notice of her claim of maintenance. The principle is that under Hindu law the binding debts of the deceased owner take precedence even over the claim for maintenance of the widow—*Lakshman v. Satyabhamabai*, 2 Bom. 494; *Gur Dayal v. Kaunsilla*, 5 All. 367; *Somasundaram v. Unnamalai*, 43 Mad. 800 (801); *Brij Raj v. Ram Dayal*, 7 Luck. 411, A.I.R. 1932 Oudh 40 (43), 135 I.C. 369. But this rule of Hindu law applies only so long as the two obligations are both not made *charges* on the property. If either of them assumes that shape (*e.g.*, if the maintenance is charged on the property), then it would take precedence over the other—*Somasundaram v. Unnamalai*, 43 Mad. 800 (802), 12 L.W. 163, 59 I.C. 398.

40. Where, for the more
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 independently of
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 property of another or of any
 easement thereon, a right to
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 latter property, or to compel its
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40. Where, for the more
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 property of another or of any
 easement thereon, a right to
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 latter property, or

where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,

or of obligation annexed to ownership, but not amounting to interest or easement.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to B. While the contract is still in force, he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

Amendment:—The first para has been amended by sec. 12 of the T. P. Amendment Act (XX of 1929). See Note 177 below.

177. Para 1:—Restrictive covenants:—The first para has been amended by omitting the words “compel its enjoyment.” These words refer to affirmative covenants and by the omission of these words the Legislature has confined the operation of the first para of this section to restrictive or negative covenants only. In *Tulk v. Moxhay*, 2 Phill. 774, the plaintiff, the owner of a vacant piece of land and of houses surrounding it, had sold the vacant piece of ground to a person who covenanted that he would keep the same in its then form in an open state uncovered with buildings, and the defendant bought the land from that person with notice of the covenant; *held* that the covenant was enforceable against the defendant who had notice thereof, and therefore he was not entitled to build on the land. It should be noted that the covenant, though affirmative in terms, was really of a negative character (*viz.*, *not* to build upon the land), and in this view the decision was correct. But the language used by Lord Cottenham seemed to lay down that both affirmative and negative covenants were enforceable against the purchaser's transferee. This case was therefore questioned in the Court of Appeal in *Haywood v. Brunswick Building Society*, 8 Q.B.D. 403, where it was held that covenants of a negative character only could be enforced on the principle of *Tulk v. Moxhay*. The present section has been amended in the light of *Haywood's* case.

See the remarks of the *Special Committee* cited in Note 98 under sec. 11.

So, the first para of this section deals with what are called restrictive covenants which are enforced in equity in England on the ground that the person entitled to the right has an equitable interest in the land or a right in the nature of an equitable easement—*Basdeo v. Jhagru*, 46 All. 333 (336).

A restrictive covenant is one which would entitle a third person to interfere with the free use which the transferee may choose to make of the property which is the subject matter of the contract—*Pemsel and Wilson v. Tucker*, [1907] 2 Ch. 191. A covenant which runs with the

land is a restrictive covenant because it is something which restricts the user of the land. A positive covenant never runs with the land either in law or in equity—*Jogesh Chandra v. Asaba*, 44 C.L.J. 220, A.I.R. 1927 Cal. 41 (43), 98 I.C. 46. If there is a restrictive covenant and the purchaser takes with notice of it, the person in whose favour the covenant is made can restrain the purchaser from acting contrary thereto—*Mohini Mohan v. Ramdas*, 28 C.W.N. 271, 80 I.C. 210, A.I.R. 1924 Cal. 487 (488). A covenant by a vendor not to build a beer-house or tavern on the plots of land remaining unsold is a restrictive covenant, and enforceable against the purchaser—*Richards v. Revitt*, L.R. 7 Ch. D. 224. M was allowed by the zamindar of certain lands to build houses on the lands on condition that if M sold any of the houses so built, he should pay one-fourth of the purchase money (*haq-i-chaharum*) to the zamindar. M sold one of the houses to one R who had notice of the covenant in favour of the zemindar, who thereupon sued R (as well as M) to recover one-fourth of the purchase-money. *Held* that the covenant was a restrictive covenant, binding M not to transfer his interest without the zemindar receiving his one-fourth share of the purchase-money; the covenant was therefore enforceable against R as much as against M (jointly and severally). The rule in this section is that a purchaser with notice of any restrictive covenant binding upon his vendor as a condition of the interest or the grant which he enjoys in the land, is affected in equity with notice of such restriction and is liable after he becomes a purchaser for any act done in breach of such condition—*Parbhu Narain v. Ramzan*, 41 All. 417 (419, 420), 17 A.L.J. 469, 49 I.C. 865. This case has been dissented from in *Haji Abdul v. Nandlal*, 1931 A.L.J. 429, 133 I.C. 543, A.I.R. 1931 All. 552, which lays down that a contract to pay a certain sum of money (*e.g.*, a *haq-i-chaharum*) on the happening of a certain event cannot be held to be a restrictive covenant.

178. Para 2—Obligation arising out of a contract:—This para may be compared with sec. 91 of the Indian Trusts Act (II of 1882) which lays down that “where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.”

The rights described in this para arise out of a contract between the person entitled to the rights and the owner of the property transferred. They involve an obligation on the latter but do not presuppose the possession of any property by the former. This para deals with contractual obligations relating to land but falling far short of any interest therein.

A mere contract of sale, though it does *not confer an interest* in the subject matter of the contract, still creates an obligation annexed to the ownership of the property which can be enforced by the promisee under the contract against a transferee with notice—*Rebala Venkata v. Yellappa*, 5 L.W. 234, 38 I.C. 107 (108); *Puthenpurayil v. Kondiyal*, (1916) 2 M. W.N. 31, 34 I.C. 906 (908); *Gangaram v. Laxman*, 40 Bom. 498 (502).

A contract giving rise to a right of *pre-emption* falls under the second para of this section. The promisee in such a contract is clearly entitled to the benefit of the obligation entered into by the promisor, namely that when he proposes to sell the land, he will give the promisee the first offer. Such a contract is binding on the representatives of the parties to the

contract, as well as on transferees with notice and gratuitous transferees—*Basdeo v. Jhagru*, 46 All. 333 (336, 346), A.I.R. 1924 All. 400, 83 I.C. 390, 22 A.L.J. 265; see also *Jagamaya v. Tulsa*, 48 All. 12, 89 I.C. 444, A.I.R. 1926 All. 70; *Muhammad Jan v. Fazluddin*, 46 All. 514 (517, *per Lindsay J.*), 22 A.L.J. 400, A.I.R. 1924 All. 657, 85 I.C. 482.

The plaintiff had entered into an agreement with the defendant's vendor by which the latter agreed to a restriction of the ordinary user of his property. On the strength of this agreement the plaintiff sued the defendant for an injunction restraining him from using the property in a certain way. *Held* that the agreement did not create an interest in the defendant's property in favour of the plaintiff, or an easement thereon. It was merely a restrictive covenant which would be binding on the defendant only if he had notice—*Gordhandas v. Mohanlal*, 45 Bom. 170 (173).

Annexed to the land:—In order that the second para of this section may apply, the covenant must be *annexed to the land*. Thus, an undertaking by a vendor that he would pay any revenue that might be assessed on the land was not held to be a covenant falling under this section but was merely a *personal* covenant—*Ramadhin v. Sheoratan*, 6 O.C. 184; *Pachan Singh v. Jangjit Singh*, 39 All. 166 (170). Where on a partition between the brothers, a mortgage-debt due by the family is apportioned and there is a covenant by which a defaulting member's share will be liable for any excess amount paid by another member, such a covenant is a restrictive covenant in the nature of an obligation annexed to the ownership of immovable property; and a member making the excess payment is entitled to enforce the covenant against a purchaser of the defaulting member's property with notice (actual or constructive) of the covenant—*Abdul Razak v. Abdul Rahiman*, A.I.R. 1933 Mad. 715 (719).

The terms "annexed to the ownership" must not be understood to mean 'creating any interest or charge in the land' but simply 'relating to the ownership or by virtue of the right of proprietorship.' A contract of *pre-emption* entered into by the proprietors in a village, though a personal one in the sense that it creates no interest in the land, is also entered into by virtue of their position as proprietors and is entered into in respect of their property, and must from its very nature be deemed to have been annexed to the ownership of the property—*Basdeo v. Jhagru*, 46 All. 333 (346), 22 A.L.J. 265, 83 I.C. 390, A.I.R. 1924 All. 400; followed in *Jagamaya v. Tulsa*, 48 All. 12, A.I.R. 1926 All. 70, 89 I.C. 444.

Where an ekrarnama provided that in the event of the executant not paying the allowance fixed for maintenance the obligee was to have liberty to proceed against the properties relinquished by her, and in case she was unable to realise the arrears from those properties she might have recourse to the other properties of the obligor, no particular or specific property having been mentioned as liable for the claim, the deed could not be construed as creating any charge but only an obligation arising out of a contract, annexed to the ownership of immovable property within the meaning of this section—*Mohini v. Purna Sashi*, 36 C.W.N. 153 (157), 55 C.L.J. 198, A.I.R. 1932 Cal. 451. Unless the obligation creates an interest in or charge on the property, it cannot be enforced against a *bona fide* purchaser without notice—*Ibid*. But an obligation to pay *zar-i-chaharum* (one-fourth of the sale price, payable by the tenant to the landlord, in case the former sold his interest in the land) is merely a personal obli-

gation to pay a certain sum of money to a third party, arising out of a contract, and is not an obligation annexed to the ownership of land—*Haji Abdul v. Nandlal*, 1931 A.L.J. 429, 133 I.C. 543, A.I.R. 1931 All. 552 (553).

179. Transferee with notice:—It is essential that an assignee of the original covenantor must have *notice* of the restrictive covenant, if he is to be bound by it—*Chaturbhuj v. Mansukhram*, 27 Bom.L.R. 73, 86 I.C. 19, A.I.R. 1925 Bom. 183 (184). The rights or obligations under this section may be enforced against a transferee with notice thereof, on the equitable doctrine that a person who takes with notice of a covenant is bound by it—*Rogers v. Hosegood*, [1900] 2 Ch. D. 383. The transferee's liability rests on the ground that in justice he ought not to evade the discharge of the obligation which was incumbent on his transferor. On his taking as a purchaser with notice of the obligation there is no reason why his position should be better than that of his vendor, for presumably the existence of the obligation has been taken into account in fixing the price—*Shephard and Brown*, 7th Edn., pp. 124-125.

A person who purchases property knowing that it is encumbered with a debt is liable under this section to discharge the debt—*Mahadeo v. Sant Baksh*, 23 O.C. 118, 57 I.C. 513 (516).

The notice referred to in this section must be a clear unequivocal notice. Vague references are of no effect—*Nur Mahomed v. Dinshaw*, A.I.R. 1922 P.C. 393 (396), 71 I.C. 625, 28 C.W.N. 522.

The notice may be actual or *constructive*. Where a vendee had constructive notice of the covenant of pre-emption embodied in a registered deed of lease, the covenant was enforceable against the vendee—*Jagamaya v. Tulsa*, 48 All. 12, A.I.R. 1926 All. 70, 23 A.L.J. 885, 89 I.C. 444. Thus, when a mortgagee is aware of circumstances which ought to have put him on inquiry, and when by such inquiry he would have known of the existence of a previous agreement by the mortgagor to mortgage the same property to a third person, he must be deemed to have had constructive notice of the agreement, and in accordance with the provisions of this section his mortgage-rights must be postponed to those of the party in whose favour there has been a previous agreement—*Kameswaramma v. Sitaramanuja*, 29 Mad. 177. Where a mortgagee in possession entered into an agreement to purchase the mortgaged property, he can bring a suit to enforce the contract as against a subsequent purchaser. As the subsequent purchaser knew that the property was in the possession of the mortgagee, he ought to have enquired of the mortgagee as to the nature and extent of his interest (*i.e.*, whether he was in possession as mortgagee or by virtue of any other right) and as he abstained from making any inquiries of him, he must be deemed to have had notice of the agreement to sell in favour of the mortgagee, and cannot therefore resist his suit—*Puthenpurayil v. Kondiyal*, (1916) 2 M.W.N. 31, 34 I.C. 906 (908).

If the contract is contained in the *wajib-ul-arz* of the village in which the property is situated, it is sufficient notice, and the transferee by purchase cannot be allowed to plead want of notice—*Basdeo v. Jhagru*, 46 All. 333 (337), 22 A.L.J. 265, A.I.R. 1924 All. 400, 83 I.C. 390.

The right or obligation can be enforced under this section against a transferee with notice, even though he has purchased under a *registered* deed. A party who purchases under a registered deed, with notice of a

prior agreement for sale, shall not be allowed to retain the property, as against the person claiming under the prior agreement—*Chundernath v. Bhoyrub*, 10 Cal. 250; *Gangaram v. Laxman*, 40 Bom. 498 (502); *Desai-bhai v. Ishwar*, 44 Bom. 586 (588). A registered purchaser of land, who buys with notice of a prior unregistered contract by his vendor to sell the same land to the plaintiff, cannot resist a suit for specific performance on the plea of registration—*Kavar v. Ismail*, 9 Mad. 119. Where a *bona fide* contract, whether oral or written, is made for the sale of property, and another party afterwards buys the property with notice of the contract, the title of the party claiming under the contract prevails against the subsequent purchaser, although the latter's purchase may have been registered and he has obtained possession under his purchase—*Chunder Kanta v. Krishna Sunder*, 10 Cal. 710. See also *Cooverji v. Bhimji*, 6 Bom. 528; *Puchha Lal v. Kunj Behari*, 18 C.W.N. 445, 19 C.L.J. 213, 20 I.C. 803; *Krishna v. Gangaram*, 13 All. 28.

180. Obligation created by decree:—This section deals with personal rights in cases where such rights do not arise out of a specific charge on immoveable property. But where such a charge (*e.g.*, obligation to pay money out of certain property) is created by a *decree*, it would bind the immoveable property even in the hands of a transferee for consideration and without notice; the purchaser cannot avoid a specific charge created by the decree on the property of the vendor on the ground of his being a *bona fide* purchaser without notice—*Chaudhuri Fateh Ali v. Gobardhan (Razia Begam v. Ishrat)*, 5 Luck. 172, 6 O.W.N. 493, A.I.R. 1929 Oudh 316 (318, 319).

Gratuitous transferee:—The right will be enforced against a gratuitous transferee. On taking the property as a gift there is no reason why he should be in a better position than his transferor or why the right of the third person should be defeated by the transfer. Moreover, in the case of a gratuitous transfer, the notice must be presumed to have been conveyed to the transferee.

181. Execution sale:—Although the word 'transferee' in this section refers to a transferee under a private alienation, still the rule of this section may apply to a purchaser at Court-action—*Rebala Venkata v. Mangadu Yellappa*, 5 L.W. 234, 38 I.C. 107 (108). Therefore, where a creditor attaches a property which is subject to a particular obligation arising out of a contract, he is not able to override that obligation but can sell the property only subject to such obligation. Thus, where B entered into a contract to sell his property to A, and subsequently C, B's creditor, attached the property in execution of a decree he had obtained against B, *held* that A was entitled to the property as against the execution-purchaser—*Rebala Venkata v. Mangadu Yellappa*, 5 L.W. 234, 38 I.C. 107 (108, 109). In *Nur Mahomed v. Dinshaw*, A.I.R. 1922 P.C. 393 (396), 28 C.W.N. 522, 71 I.C. 625 their Lordships of the Judicial Committee applied the principle of this section to a Court sale.

41. Where, with the consent, express or implied, of the person interested in immoveable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that

Transfer by ostensible owner.

the transferor was not authorized to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

182. Principle:—"This section is based on the principle that where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created or could have prevented the opportunity for the fraud, and that in such cases hardship is caused by the strict enforcement of the general rule that no one can confer a higher right on property than he himself possesses." (*Per* Sir Courtney Ilbert)—*Gazette of India*, 1884, *Supplement*, p. 182. This section forms an exception to the general rule that no one can convey a better title than he himself has in the property—*Kanhu Lal v. Pallu Sahu*, 5 P.L.J. 521 (535), 57 I.C. 353. Where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right—*Thakuri v. Kundan*, 17 All. 280 (281).

The rule in this section is based upon the doctrine of estoppel. "It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing that either he (the purchaser) had a direct notice, or something which amounted to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an inquiry which, if prosecuted, would have led to a discovery of it."—*Ram Coomar v. McQueen*, 18 W.R. 166, 11 B.L.R. 46 (P.C.); *Khawaja Muhammad Khan v. Muhammad Ibrahim*, 26 All. 490; *Baidya Nath v. Alef Jan Bibi*, 36 C.L.J. 9; *Raja of Karvetnagar v. Saravana*, 4 L.W. 200, 35 I.C. 893 (898); *Maung Po v. Ma Myit*, 146 I.C. 1073, A.I.R. 1933 Rang. 361 (362); *Lal Singh v. Paras Ram*, 68 I.C. 332, A.I.R. 1922 Nag. 226. A person shall not be permitted to represent a state of facts at one time, and afterwards when such representation has induced another to change his position, seek to show that as such his representation was erroneous. It is a doctrine too well established now to be shaken, and whether it is accurately called 'estoppel' or not, the principle is perfectly intelligible—*per* Lord Halsbury L.C. in *Colonial Bank v. Cady*, 15 App. Cas. 267. "Strangers can only look to the acts of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker, and if a person authorises another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority."—*per* Lord Ellenborough in *Pickering v. Busk*, 15 East. 38 (43).

183. Scope of section:—This section does not apply to a transfer of a decree of foreclosure, because such a transfer is not a transfer of *immoveable* property—*Mahomed v. Ma O*, 9 Bur.L.T. 121, 36 I.C. 426.

The word 'transfer' in this section includes a payment in redemption of a mortgage. The payment redeeming a mortgage and thereby extin-

guishing the rights transferred by the mortgage is a transfer under this section, in as much as the rights created by the mortgage in favour of the mortgagee are re-transferred to the mortgagor—*Ganpat v. Budhmal*, A.I.R. 1927 Nag. 86, 98 I.C. 1062.

This section does not apply to the case of a purchase of the equity of redemption. A person who purchases the equity of redemption cannot repudiate his liability under the mortgage even if he purchases without notice of the mortgage, because there is no law which requires a mortgagee to give notice of his mortgage to the world—*Narayan v. Purushottam*, 27 N.L.R. 144, A.I.R. 1931 Nag. 144 (145), 134 I.C. 676.

This section applies only to a voluntary transfer, and does not apply to a transfer made *in invitum* (auction sale) by an order of the Court under which the judgment-debtor himself does not join in the actual transfer—*Vaman v. Tikaram*, 29 Bom.L.R. 471, A.I.R. 1927 Bom. 368, 102 I.C. 64. But the Madras High Court has stated in a short judgment that although this Act applies only to transfers by act of parties, still the principle of this section applies in favour of an auction-purchaser in a court-sale—*Naraprath v. Paramboli*, 34 I.C. 494 (Mad). Recently, the Allahabad High Court has applied the principle of this section to a case of auction-purchase—*Rasulan v. Nand Lal*, 1930 A.L.J. 1091, A.I.R. 1930 All. 521.

184. Consent:—This section, in protecting a transferee in good faith from an ostensible owner, lays down the condition precedent that the persons interested in the property must have given their consent, express or implied—*Ghulam Haidar v. Manager*, 73 I.C. 711.

The consent referred to in this section must be an intelligent consent and not one brought about by misrepresentation on the part of the person making it as to his legal rights—*Dungaria v. Nand Lal*, 3 A.L.J. 534. But the consent mentioned in this section includes a consent which is based on a mistake—*Ramprosad v. Imratbai*, 18 N.L.R. 27, A.I.R. 1922 Nag. 79, 65 I.C. 477.

Consent may be express or implied, *i.e.*, consent need not always be by word, it may be by act or conduct, *e.g.*, by *acquiescence*. Implied consent is nothing more or less than acquiescence which is quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or by conduct. In other words, acquiescence does not mean simply an active intelligent consent, but may be implied if a person is content not to oppose irregular acts which he knows are being done—*Duke of Leeds v. Earl of Amherst*, 2 Ph. 117; *Evans v. Smallcombe*, L.R. 3 H.L. 249; *Cowell v. Watts*, 2 Ha. & Tw. 224; *Ananda v. Parbati*, 4 C.L.J. 198 (207); *Sarat Chunder v. Gopal Chunder*, 19 I.A. 203, 20 Cal. 296 (311); *Bhimappa v. Basawa*, 29 Bom. 400 (403).

“If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms”—*per* Blackburn, L.J., in *Smith v. Hughes*, 6 Q.B. 607; *Sukhimoni v. Mohendra*, 4 B.L.R. 16 (P.C.); *Dungaria v. Nandlal*, 3 A.L.J. 534.

But *mere quiescence* or absence of interference on the part of the true owner does not act as an estoppel unless it amounts to a wilful

misleading of the purchaser. It is stated that a duty to speak, which is the ground of liability, arises wherever and only where silence can be considered as having an active property, that of misleading—*Joy Chandra v. Sreenath*, 32 Cal. 357. The rule under this section is that one, who knowing his own title stands by and *encourages* a purchase of the property as another's, will not be allowed to dispute the validity of the sale; but this rule implies a *wilful misleading* of the purchaser by some breach of duty on the owner's part, and is not applicable to cases where there has been nothing more than a mere quiescence on the part of the true owner—*Baswantappa v. Ranu*, 9 Bom. 86; *Chintaman v. Dareppa*, 14 Bom. 506. It is of the essence of this section that the conduct of the real owner must induce a belief in the transferee that his transferor had power to make the transfer—*Md. Sujat v. Chandbi*, 97 I.C. 988, A.I.R. 1927 Nag. 41.

Attestation of a deed amounts to consent to the terms of the deed. Thus, where in a registered mortgage-deed, the mortgagor described himself as the owner of the property mortgaged, and in the deed it was distinctly stated that the statement was attested by B, and that B had no objection to the mortgage, *held* that B was subsequently estopped from asserting his own interest in the property—*Mussammat Basso v. Mir Mahammad*, 278 P.L.R. 1913, 20 I.C. 291; *Sant Singh v. Lachmi*, 126 P.W.R. 1918, 46 I.C. 102.

Acquiescence is not a question of fact but of legal inference from facts found—*Beni Ram v. Kundan Lal*, 21 All. 496 (P.C.). It cannot be inferred from a mere absence of protest, especially where the party dealing with the property knew or could have known that the property he was dealing with belonged to another—*Fatehyab v. Muhammad*, 9 All. 434; *Uda Begam v. Imamuddin*, 1 All. 82; *Baswantappa v. Ranu*, 9 Bom. 86; *Chintaman v. Dareppa*, 14 Bom. 506. But it can be inferred from absence of acts of ownership for a long time. Thus, where for a long term of years no act of ownership was exercised by the plaintiff over the house in dispute, but, on the contrary, she allowed her husband's cousin to deal with the house apparently as the ostensible owner thereof, and in consequence of such conduct the defendants had been induced to purchase the same, it was held that the plaintiff could not successfully sue for recovering her share in the house—*Thakuri v. Kundan*, 17 All. 280 (281, 282). The fact that the real owner kept silence and advanced no claim will be treated as implied consent on his part. One who culpably stands by and allows another to hold himself out to the world as the owner of property and thereby sell it to a *bona fide* purchaser, cannot afterwards assert his title against the latter—*Baidya Nath v. Alef Jan*, 36 C.L.J. 9, A.I.R. 1923 Cal. 240, 70 I.C. 194. The principle of this section relates to a case where one stands by and acquiesces in something that is being done by another, and if in consequence of such acquiescence some injury is caused to some third party, it is not open to the person so acquiescing to say that what was done by that other person was not authorised by him—*Mahant Bhagaban v. Bisweswar*, 44 C.L.J. 434, A.I.R. 1927 Cal. 220, 100 I.C. 302.

Where the consent is only for one transfer, it cannot be made use of by the ostensible owner for a transfer of a different kind—*Kuppanmal v. Gopal*, 1 L.W. 649, 27 I.C. 14.

A transferee from a Hindu widow, who takes the property from her

before the reversioner's right has accrued, cannot successfully plead the bar of sec. 41; because it cannot be said that he has taken the property from an ostensible owner who was in possession with any express or implied consent of the reversioners. A Hindu widow enters into possession of her husband's property *by right and not with the consent* (express or implied) *of the reversioners*. A transferee from such a person who is in possession by her own right and as to whose possession no consent of the reversioners can be implied by law, cannot claim the protection of sec. 41, T. P. Act—*Shib Deo v. Ram Prasad*, 46 All. 637 (648), 22 A.L.J. 690, A.I.R. 1925 All. 79, 87 I.C. 938. If a Hindu widow makes a testamentary disposition of the property in which she has only a woman's estate, the will is invalid; but if the reversioners consent to the will and even to the getting of the legatee's name entered in the Record of Rights, and a third person has on the faith thereof advanced a loan to the ostensible owner (the legatee), the reversioners are estopped from asserting their rights to the property—*Tejmal v. Savaji*, 27 N.L.R. 283, A.I.R. 1931 Nag. 194 (196).

A person who holds *adversely* to the real owner cannot be said to be an ostensible owner, because he does not hold with the *consent* (express or implied) of the real owner—*Jamna Das v. Uma Shankar*, 36 All. 308 (312). If A applies to get his name entered in the Revenue papers, and B (the real owner) opposes the application for the entry, but in spite of the opposition A gets his name entered, A cannot be said to hold as an ostensible owner with the *consent* of the real owner—*Pateshri v. Nageshar*, 8 A.L.J. 358, 10 I.C. 961 (962); affirmed on appeal, *Nageshar v. Raja Galeshri*, 20 C.W.N. 265 (P.C.), 34 I.C. 673 (675), A.I.R. 1915 P.C. 103.

Disclaimer by real owner:—A person who has *disclaimed* a title cannot be allowed to set it up afterwards to the prejudice of the parties who have purchased the disclaimed property from the ostensible owner in good faith and for value—*Fakhir Jahan v. Abdul Ghani*, 5 O.L.J. 49, 45 I.C. 307.

Transfer by ostensible owner after suit by real owner:—Although a person may hold himself out as the ostensible owner of a property with the consent (express or implied) of the real owner, still if the real owner brings a suit against the ostensible owner for the possession of the property, and then the latter transfers the property after the institution of the suit, the previous consent must be deemed to be revoked by the act of filing the suit. The word 'consent' modifies not only the verb 'is' but also the verb 'transfers'; that is, sec. 41 requires that the consent must continue up to the time of the transfer. But here the institution of the suit is in itself a very strong evidence that the consent did no longer subsist. Moreover, the estoppel arising under sec. 41 cannot override the imperative provision of *lis pendens* laid down in sec. 52. Further, it is immaterial that the ostensible owner, at the time of transferring the property, did not know that the real owner had filed a suit against him; for the pendency of the suit would by itself operate as a constructive notice of the revocation of the previous consent—*Shafiqullah v. Samiullah*, 52 All. 139, A.I.R. 1929 All. 943 (945), 1930 A.L.J. 57.

185. Person interested:—The consent which is to be given under this section must be the consent of the person interested in the immovable property, *i.e.*, of the owner. A *minor* owner of property cannot give consent, and therefore during the minority of the true owner no one can

hold himself out as the ostensible owner with the consent of the real owner—*Dambar Singh v. Jawitri*, 29 All. 292 (294); *Dalibai v. Gopibai*, 26 Bom. 433 (436). So also, a *guardian* is not a person personally interested in the minor owner's property and therefore cannot give consent to a third party to hold himself out to the world as the owner of the infant's property so as to enable a transferee from such party to claim the benefit of this section—*Dambar Singh v. Jawitri*, 29 All. 292 (294). And a minor will not be bound by the consent given by his guardian in possession—*Ram Charan v. Joy Ram*, 17 C.W.N. 10, 16 I.C. 825 (828).

Similarly, religious endowments do not fall under this section, as the property is vested in the shrine and no particular person can give consent express or implied—*Ghulam Haidar v. Manager*, 73 I.C. 711.

186. Ostensible Owner:—The expression 'ostensible owner' excludes such persons who hold possession of property professedly as agents, guardians or in any other fiduciary character—*Dambar Singh v. Jawitri*, 29 All. 292 (294); *Abdulla v. Bundi*, 34 All. 22 (24); *Maung Bya v. Maung San*, 4 Bur.L.T. 74, 10 I.C. 778; *Chandra Kanta v. Bhagjur*, 1 I.C. 525 (527). A guardian cannot be said to be the ostensible owner with the consent, express or implied, of the minor—*Abdulla v. Bundi*, 34 All. 22 (24). If a manager of a joint Hindu family consisting of minors alienates property, the alienee cannot be called an ostensible owner, with the consent of the real owners, because the minors cannot give their consent, express or implied, to the alienee appearing as the ostensible owner. Consequently, if the alienee transfers the property to some other person, that person cannot plead sec. 41, in a suit by the minors to recover possession. In such a case, the question whether such person made reasonable inquiries or acted in good faith is immaterial—*Shankar v. Daooji*, 53 All. 290 (P.C.), 35 C.W.N. 693 (698, 699), 132 I.C. 602, A.I.R. 1931 P.C. 118.

A *mortgagee* is not an ostensible owner within the meaning of this section. The words "person interested in immoveable property" mean the full owner, and an 'ostensible owner' is a person who is apparently a *full* or *unqualified* owner, not a person who is only a qualified owner, such as a mortgagee—*Jogendra v. Salamat*, 33 C.W.N. 994 (996), A.I.R. 1930 Cal. 92, 125 I.C. 863 (*per* Mitter J.; Jack J. contra). A person cannot be said to be an ostensible owner when he had himself admitted in a previous transaction that he was no more than a mortgagee of the property in dispute; the fact that 30 years ago his name was recorded in the revenue papers as owner is immaterial—*Mohammad Shafi v. Mohammad Said*, 52 All. 248, A.I.R. 1930 All. 847 (848), 122 I.C. 871.

Where a charge was created by a decree on the property in the possession of the judgment-debtor, having the effect of reducing his full ownership into a limited ownership, *held* that he was not an ostensible owner of the property with the consent of the decree-holder, and he cannot give a good title to a transferee for value without notice—*Kallappa v. Balwant*, 27 Bom.L.R. 434, 87 I.C. 951, A.I.R. 1925 Bom. 443.

This section is based on the principle of representation or holding out. Where A, being in bad circumstances, was permitted to live on B's land on condition that A's wife should cook in B's house, and that A and his wife should do other menial works in B's family, it cannot be said that B held out A as the owner of the land. A's possession was merely permissive—*Chooni Lal v. Nilmadhab*, 41 C.L.J. 374, A.I.R. 1925 Cal. 1034, 86 I.C. 734.

Where a Muhammadan husband transferred his property to his wife as *Mahr*, and in spite of it he continued in possession of the property and it stood in his name, *held* that he was the ostensible owner of the property with the implied consent of his wife, and a transferee taking the transfer of the property from him under the assurance that he was the owner and in possession is protected by this section—*Makkama v. Masabai*, 27 Bom. L.R. 208, A.I.R. 1925 Bom. 299, 86 I.C. 876. Where A, a lessee of Government land, transferred the lease to B by registered deed, but B did not apply to get his name registered in the rolls as transferee, and did not also take steps to obtain possession of the land, and further allowed the document of lease to remain in the possession of A, *held* that A was the “ostensible owner” of the property, and a *bona fide* transferee from him was protected by this section—*Chettyar Firm v. Mg. Kyaing*, 7 Rang. 276, A.I.R. 1929 Rang. 333 (335), 119 I.C. 217.

The possession of a *manager* cannot be treated as sufficient evidence of ostensible ownership with the consent, express or implied, of the real proprietor. Where the manager got his name entered in the municipal house-tax register, during the prolonged absence of the owner, *held* that the entry was only made for the purpose of assessment and collection of house tax and was not intended for registering title. Such an entry was not always enough to induce anybody to think that the person whose name was entered was the proprietor and had a right to sell the property which was entered in his name—*Mahomed Sulaiman v. Sakina Bibi*, 44 All. 674 (676), 20 A.L.J. 654, A.I.R. 1922 All. 392, 69 I.C. 701. The mere fact that a certain person's name appears in the mutation register is not sufficient to make him the ostensible owner, when the mutation proceedings disclose the fact that other persons claimed ownership in the property—*Amir Jahan v. Khadim Husain*, 8 O.W.N. 237, 132 I.C. 75, A.I.R. 1931 Oudh 253 (255).

The question as to whether a person is an ostensible owner with the consent of the real owner is a question of fact—*Jamna Das v. Uma Shankar*, 36 All. 308 (312).

Reversioner:—Since a Hindu female cannot transfer any property without legal necessity, it follows that if she orally transfers a portion of the property to a reversioner and puts him in possession, such reversioner cannot be called an ostensible owner with the consent of the female or of the other reversioners—*Shambhu v. Mahadeo*, 55 All. 554, 144 I.C. 293, A.I.R. 1933 All. 493 (494).

Benamidar:—Where the real owner of immoveable property had permitted the *benami* owner to hold himself out as the real owner, and a third person had purchased from such *benami* owner for value, *held* that the real owner could not recover unless he could prove that the purchaser had direct or constructive notice of the real title or that there existed circumstances which ought to have put him on an inquiry which, if prosecuted, would have led to the discovery of the real title—*Jokhu v. Mehdi*, 1881 A.W.N. 67. So if property is purchased in the name of a *benamidar* and the *indicia* of ownership are placed in his hands, the true owner can only get rid of the effect of an alienation by showing that it was made without his acquiescence and that the purchaser took with notice of that fact—*Bhugwan v. Upooch*, 10 W.R. 185. Where the owner of a property, being hard pressed by creditors executes a *benami* sale-deed, but continues in possession of the property, and the *benamidar* sells the property

to a third person who has knowledge of the benami nature of the transaction which amounts to fraud, and the purchaser brings a suit to recover possession, the Court will neither assist the purchaser nor the real owner—*Lakshman v. Vasudeo*, 33 Bom.L.R. 356, 133 I.C. 265, A.I.R. 1931 Bom. 227 (229). Where a husband purchased property in the name of his wife, representing that the purchase money was her *stridhan*; the wife took possession of the property and the husband was never in possession; and the husband, in all his acts both private and public, during his lifetime, represented that the property was his wife's; and then the wife sold the property after her husband's death, *held* that there were continuous declarations and acts by the husband calculated to cause any person (*e.g.*, the purchaser) to believe that she was and had been the owner in her own right and in possession of the property, and that the heirs of the husband could not recover the property from the purchaser—*Luchman Chunder v. Kalli Charan*, 19 W.R. 292 (P.C.). Similarly where a husband purchased property in the name of his wife, and the kabuliyats, towjis and counterfoil rent-receipts all stood in the wife's name, and the husband had never himself held title to the property in his own name, *held* that the wife was all along held out as the ostensible owner, and a person taking a mortgage from her was protected by this section—*Annada Mohan v. Nilphamari Loan Office*, 26 C.W.N. 436 (439), 65 I.C. 245.

187. When purchaser will be protected:—In order to obtain the protection afforded by this section it is necessary for the transferee to prove (1) that he has given valuable consideration; (2) that he has acted in good faith; and (3) that he has taken reasonable care or made reasonable inquiries to ascertain that the transferor had power to make the transfer. Where any one of these essential elements is wanting (*e.g.*, where the transferee omitted to make proper enquiries as to the transferor's title) the transferee is not entitled to the protection provided by this section—*Ballu Mal v. Ram Kishen*, 43 All. 263 (264, 265), 19 A.L.J. 11, 64 I.C. 14.

This section is not limited to the purchaser from the ostensible owner, but it extends to subsequent purchasers; and it may safely be maintained that even if one of such purchasers had some sort of constructive notice, the last purchaser cannot be dislodged from his position as a *bona fide* purchaser for value without notice, without proof of circumstances bringing such notice home to him—*Gholam Siddique v. Jogendra*, 31 C.W.N. 205 (209), 43 C.L.J. 452, 96 I.C. 199, A.I.R. 1926 Cal. 916.

188. Reasonable care or inquiry:—A purchaser from the ostensible owner cannot resist the real owner's title unless he can show that he took *reasonable care* to ascertain that the transferring ostensible owner had power to make the transfer and that he (the purchaser) acted in good faith—*Pateshri v. Nageshar*, 8 A.L.J. 358, 10 I.C. 961 (962); *Mohammad Shafi v. Mohammad Said*, 52 All. 248, A.I.R. 1930 All. 847 (848); *Rahiman v. Khathoon*, 4 L.W. 193, 35 I.C. 569; *Thungavelu v. Mangathaye*, (1913) M.W.N. 674, 21 I.C. 21 (22); *Kanhu Lal v. Palu Sahu*, 5 P.L.J. 521 (534, 536); *Sheo Gobind v. Anwar Ali*, 10 P.L.T. 254, A.I.R. 1929 Pat. 305 (306), 116 I.C. 779; *Ram Charan v. Joy Ram*, 16 I.C. 825 (829), 17 C.W.N. 10; *Kasturi Bibi v. Balliram*, A.I.R. 1923 Nag. 15. It is necessary under this section to prove not merely consideration but also good faith and due inquiry—*Lakshman v. Vasudeo*, 33 Bom.L.R. 356, A.I.R. 1931 Bom. 227.

All who wish to take advantage of this section must be able to show that they have made an inquiry about the transferor's title—*Hanuman v. Abbas*, 4 Luck. 452, A.I.R. 1929 Oudh 193 (203), 120 I.C. 387. Only those persons are entitled to claim protection under this section who, in spite of necessary enquiry, have not been able to discover who the real owner of the property is, and who have, in full belief that the person making a transfer in their favour is the person really entitled to that property, taken the transfer from him. If the transferee has not made necessary enquiries about the title of the real owner, the protection afforded by this section is not available to him—*Jagmohan v. Indar*, 4 Luck. 597, A.I.R. 1929 Oudh 160 (162), 115 I.C. 97. No purchaser can protect himself against the claim of a real owner merely by saying that he had no notice of the real owner's title. He is not justified in shutting his eyes and buying recklessly from a vendor without any inquiry, and resisting the real owner on the ground that the real owner did not come forward. He must make some reasonable inquiry into the title before he can take advantage of the doctrine of purchase for value without notice which could protect him against an undiscoverable and hidden equitable interest. When he has taken reasonable care to ascertain his vendor's title, then no doubt if there is an equitable interest of which he could by such reasonable care discover no trace, the doctrine of purchase for value without notice holds good—*Zungabai Bhawani v. Appaji*, 9 Bom.L.R. 388. Anybody purchasing a property has to make a reasonable inquiry as to the title of his vendor; much more in a case where he sets up a title of the ostensible owner as against the title of the real owner, whose title can be denied only upon the principles of sec. 41 by reason of keeping his secret title behind concealed from the view of the public and putting up an ostensible owner as the real owner of the property—*Sheogobind v. Anwar Ali*, 10 P.L.T. 254, A.I.R. 1929 Pat. 305 (307), 116 I.C. 779.

Reasonable care is to be expected from every one who claims to have purchased free from a really existing right equitable or legal, and when the purchaser has failed to exercise it, he cannot claim that the real owner should be called on to prove his good faith and innocence instead—*Zungabai Bhawani v. Appaji*, 9 Bom.L.R. 388.

What is to be deemed "reasonable care" is a question of fact (*Jamna Das v. Uma Shankar*, 36 All. 308 at p. 312) and depends upon the circumstances of each case. It is one that is expected of an ordinary prudent man of business—*Kanhu Lal v. Palu Sahu*, 5 P.L.J. 521 (534), 57 I.C. 353; *Partap v. Saiyida*, 23 All. 442 (447); *Macneil & Co. v. Saroda*, 33 C.W.N. 526, 48 C.L.J. 374, 114 I.C. 142, A.I.R. 1929 Cal. 83 (86); *Gholam Shiddique v. Jogendra*, 31 C.W.N. 205 (208), 43 C.L.J. 452, 96 I.C. 199, A.I.R. 1926 Cal. 916. The ordinary standard of diligence required for ascertaining whether the transferor has power to transfer is calling for the title under which he claims and inspecting the title-deeds. If in the document itself that was produced as the title-deed for the inspection of the transferee there was any indication, anything to put the transferee on notice or enquiry with regard to the existence of some other document having regard to which any infirmity in the title of the transferor may be regarded as indicated, then the matter might conceivably be otherwise. It is possible, even in such a case, to hold that if after inspecting the other document a person should come to the conclusion that his transferor had power to transfer, and acting in that belief and finding that his vendor

had been in uninterrupted possession of the property for many years, obtain a transfer, such a case may also be covered by sec. 41—*Sethumadhava v. Bacha Bibi*, A.I.R. 1928 Mad. 778 (780, 781), 111 I.C. 539.

This section requires reasonable care, not generally, not with regard to every aspect of the transaction, but merely for the purpose of ascertaining that the transferor had the power to make the transfer. The reasonable care which is prescribed by this section should have reference only to the reasonable care to see whether by the terms under which the ostensible ownership is constituted the power to transfer is given or possessed—*Sethu Madhava v. Bacha Bibi* (supra).

A purchaser who wilfully departs from an inquiry in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted the business in the ordinary way. The words 'reasonable care' in this section are to be understood in the above sense—*Manji v. Hoorbai*, 35 Bom. 342 (348), following *Bailey v. Barnes*, [1894] 1 Ch. 25 (35). A transferee cannot claim the protection of this section if it appears that if he had acted diligently and prudently and pushed his inquiries further afield, he could have discovered the true position of his transferor (*viz.*, that he was not the owner but a mere mortgagee)—*Mohammad Shafi v. Mohammad Said*, 52 All. 248, A.I.R. 1930 All. 847 (848), 122 I.C. 871. A transferee cannot be allowed the benefit of the principle contained in this section when the slightest inquiry would have sufficed to acquaint him with the fact that the land stood in the real owner's name in the revenue maps and registers—*Maung Hmwe v. Ma Lun*, 4 Bur.L.T. 186, 11 I.C. 855; or when the mortgagee could have ascertained on the slightest inquiry that the property belonged not to the mortgagor alone but to him as well as his other brothers—*Maung Than v. Ma On*, 4 Bur.L.T. 143, 12 I.C. 858. A purchaser of land at the time of his purchase knew that the property had been previously mortgaged by his vendor and his father, and that the father lived in a house on the land. *Held* that the purchaser was by reason of the mortgage put upon inquiry as to the father's interest in the land and could not therefore claim to be a *bona fide* purchaser for value from the ostensible owner (the son) in whose name the property stood in the revenue registers—*Mahomed Ebrahim v. Maung Ba*, 7 Bur.L.T. 69, 24 I.C. 482 (483). A person who takes a mortgage from one whom he knows to be a sister's son of the last owner ought to take reasonable care to enquire and ascertain as to whether there are any collaterals in existence of the last owner, and where it was not shown that he made any such inquiries he was not entitled to the protection given by this section—*Ballu Mal v. Ram Kishan*, 43 All. 263 (265). A man who chooses to act upon a Collector's certificate in Madras as evidence of title does so at his own risk, and cannot be said to act with reasonable care and good faith—*Thungavelu v. Mangathaye*, 1913 M.W.N. 674, 21 I.C. 21 (23). Where a person purchased property from one of the four members of a joint family, and it appeared that though the property stood in the vendor's name, a little enquiry on the part of the purchaser would have put him on notice that it really belonged to the joint family, *held* that the purchaser did not take reasonable care and was not protected by this section—*Rajani Kanta v. Bashiram*, 49 C.L.J. 532, A.I.R. 1929 Cal. 636 (638), 121 I.C. 409. The mere fact that certain property is found entered in the record of rights in

the name of one person only who happens to be the *Karta* of the family and that the junior members have allowed the entry to stand, does not justify a transferee, who takes a mortgage from the recorded owner alone, in making no further inquiry. The creditor must have known that in a joint Hindu family the business is all transacted in the name of the head member, and that registers, receipts and papers also happen to be in the name of the head member. He must inquire as to whether and how far the other members are interested in it, and *prima facie* the presumption will be that they are so interested. His refusal to inquire into the title-deeds and resting content with the entry in the record-of-rights gives him no protection, and the other members are not barred from setting up their rights—*Kanhu v. Palu Sahu*, 5 P.L.J. 521 (533), 1 P.L.T. 546, 57 I.C. 353. The mere entry of one's name as owner of a property either in the Government records or in private papers does not relieve the purchaser from such owner from the duty and responsibility of making an enquiry into the title of that owner—*Sheo Gobind v. Anwar Ali*, 10 P.L.T. 254, 116 I.C. 779, A.I.R. 1929 Pat. 305 (306). A Government official acquired some zemindary property in the district in which he was employed, and he caused that property to be recorded in the Revenue papers in his sons' names. The sons sold the property, and the transferee merely ascertained that the transferors' names were for some years recorded in the revenue registers as owners, but there he stopped, without inquiring whether the property really belonged to them. It was held that as there were other circumstances which rendered it incumbent on the transferee not to rest satisfied with merely seeing that the names of the transferors were entered in the revenue records, the transferee did not use reasonable care—*Partap Chand v. Saiyida*, 23 All. 442 (447). Where the information given by the vendor, namely that he derived his title under a registered deed, was such as to put any reasonable man on inquiry and lead him to ask for production of the original deed, and if it was not produced, to ask for an explanation of its non-production, and in any case to require to see a registration copy of it, *held* that the purchaser must be deemed to have had constructive notice of the contents of the deed owing to his negligence in not doing what any prudent man would have done—*Yew Sit v. Maung Darwood*, 1 L.B.R. 196. A purchaser who merely relies on mutation of names does not act with reasonable care, for mutation of names by itself creates no proprietary title (*Chokhey Singh v. Jote Singh*, 31 All. 73 P.C.). Mutation is merely a statement of the facts which existed as to possession of the property. Consequently, neither the mutation entry nor the entry in the Record of Rights can supply the place of a title-deed; and a purchaser who acts upon such an entry as evidence of title does so at his own risk—*Md. Sujat v. Chandbi*, A.I.R. 1927 Nag. 41 (42), 97 I.C. 988.

But where the during the husband's absence on a pilgrimage, the wife sold a piece of land which had before the husband's departure been mortgaged by her with the husband's consent, and the purchaser who paid off the mortgage satisfied himself by proper inquiries that the wife's name was entered in the *Raj sereshta* as owner, *held* that the purchaser acted with reasonable care and in good faith, and the husband could not recover the land nor redeem the mortgage—*Niras Purbe v. Tetri Pasin*, 20 C.W.N. 103 (104), 32 I.C. 82. A Hindu husband purchased property in the name of his wife, and held her out as the owner of the property. After her husband's death the wife mortgaged the property, and the

mortgagee made inquiries in the village, looked at the kobala and other papers, *viz.*, kabuliats, toujis and counterfoil rent-receipts, and found that they all were given in the wife's name. *Held* that the mortgagee, having taken the mortgage in good faith, without any notice of the husband's title, and making reasonable inquiries, was protected by this section—*Annada Mohan v. Nilphamari Loan Office*, 26 C.W.N. 436 (439), 65 I.C. 245. Where the defendant before purchasing a mahal from the *farzidar* of the plaintiff, made inquiries in the Registration Office and from the raiyats of the village, which satisfied him that the *farzidar* was the real owner of the *mahal*, and he also consulted his Mukhtar who got for him copies of the documents wherein the beneficial owner admitted the title of the ostensible owner, *held* that the defendant being a *bona fide* purchaser for value from the ostensible owner, the plaintiff was estopped under this section from setting up his title to the mahal—*Ram Sundar v. Ram Narain*, 48 I.C. 936. Where the purchaser made inquiries from other transferees of the transferor and was told that except the transferor there was no other person who had any interest in the property, and the purchaser further inspected the Municipal Records and made inquiries in the Registration Office, but found nothing which might have put him on further inquiry, *held* that the purchaser had taken reasonable care and was protected by this section—*Md. Shakur Khan v. Shahjahan*, 63 I.C. 125 (126) (All.).

189. Nature of the inquiry:—It is impossible to lay down any general rule as to the nature of the inquiry which the intending purchaser should make. It must depend upon the circumstances of each case—*Zungabai v. Appaji*, 9 Bom.L.R. 388 (391); *Manji v. Hoorbai*, 35 Bom. 342, 12 Bom.L.R. 1044. But without laying down any general rule, it may be said that the inquiries must be of such a specific character that the Court can place its finger upon them and say that upon such facts some particular inquiry ought to have been made. It is not enough for the Court to assert generally that inquiries should be made or that a prudent man would make inquiries. Some specific circumstance should be pointed out as the starting point of an inquiry which might be expected to lead to some result—*Ram Coomar v. McQueen*, 11 B.L.R. 46 (54), 18 W.R. 166 (P.C.); *Macneil & Co. v. Saroda Sundari*, 33 C.W.N. 526, 48 C.L.J. 374, 114 I.C. 142, A.I.R. 1929 Cal. 83 (86); *Baidya Nath v. Alef Jan*, 36 C.L.J. 9, A.I.R. 1923 Cal. 423. Thus, a vendee should not be content with the paper title disclosed by the sale-deed but should also make inquiries of the person in actual possession as to his title. A vendee who does not make the inquiry should take the risk of his claim being defeated by the real owner—*Vyankappa v. Yamnasami*, 35 Bom. 269 (271), 10 I.C. 817. It is obvious that the first step which the transferee is expected to take is to search the registration office to ascertain what transfers, if any, had been made by the transferor. Where the transferee fails to do so, he cannot claim the benefit of this section—*Khatun Fatima v. Shib Singh*, 1933 A.L.J. 1036, A.I.R. 1933 All. 917 (918). To entitle a purchaser to the benefit of the protection afforded by this section he must prove that he inquired as to who was in actual possession of the land for 12 years before the purchase. He should not assume that his vendor is the true owner merely on the strength of the *pyatbaings* which are not signed by the transferors and which are not documents of title at all—*M. Po Nequein v. Maung My*, 8 Bur.L.T. 85, 27 I.C. 777.

Extent of inquiry:—There can be no inquiry when there is nothing to

inquire about. Therefore, further inquiry becomes supererogatory when the transfer is proposed, encouraged or acquiesced in by the very person whose title or interest it was to challenge the transfer—*Sarat Chunder v. Gopal Chunder*, 20 Cal. 296 (308) (P.C.). Where a person is found in possession of property, is recorded as owner, and holds title-deeds of the property, and deals with a third party in respect of it, there is nothing to suggest a want of good faith in such third party in dealing with him in respect of the property and nothing to suggest a want of care in examining the title by reason of the fact that he made no further inquiries as to title—*Khawaja Muhammad Khan v. Muhammad Ibrahim*, 26 All. 490; *Gholam Siddique v. Jogendra*, 31 C.W.N. 205, 43 C.L.J. 452, A.I.R. 1926 Cal. 916, 96 I.C. 199. Where the real owners by their conduct or omission allowed the ostensible owners to get their names recorded in the revenue papers to the exclusion of the former, which entries remained unchallenged by the true owners throughout, and the transferees from the ostensible owners examined the entries in the revenue papers which contained a detailed description of the property, *held* that the transferees had acted in good faith and there were no circumstances which rendered it necessary for them to make any further inquiry—*Mubarakunnissa v. Mahommed Raza*, 46 All. 377 (382), 22 A.L.J. 307, A.I.R. 1924 All. 384, 79 I.C. 174. Where the property stood in the name of the vendor (ostensible owner) in the revenue records, and there was really nothing to put the purchaser on an inquiry, *held* that the purchaser need not have made any further inquiry as to the vendor's interest in the property—*Mathura Prasad v. Anandi Kunwar*, 21 A.L.J. 498, A.I.R. 1924 All. 63, 74 I.C. 911. One H and his sister R inherited the property of their mother, but the name of H alone was recorded in the revenue papers and he dealt with the whole of the property as his own. In 1896 he alone mortgaged the property, and afterwards redeemed the mortgage. R had not taken any exception to that mortgage. Twenty years afterwards, he again mortgaged the property to the same mortgagee who satisfied himself that H's name was still in the revenue papers as the recognised owner of the property. R then sued to annul the mortgage so far as her share of the property was concerned and to recover her share. *Held* that the mortgagee was protected by this section. He had satisfied himself that H was the recorded owner of the property, and there was nothing to put him on an inquiry or to doubt the genuineness of the position which H had ostensibly maintained for more than 20 years and to which R had never objected—*Mul Raj v. Fazal Imam*, 45 All. 520 (523), 21 A.L.J. 424, A.I.R. 1923 All. 583, 74 I.C. 307. If the title of the transferors is based upon prior transfers, and they have the custody of the title-deeds showing them as apparent purchasers of property, a transferee from them can rely upon those deeds, and will thereby be protected by this section. If, however, the title of the transferors was by inheritance from their father, it is incumbent on the transferee to use reasonable care in ascertaining whether the transferors were the only persons on whom the inheritance devolved or there were other co-heirs. If the transferors are Mahomedans, that fact ought to put the purchaser on inquiry as to whether there was a female heir in addition to the transferors—*Md. Sujat v. Chandbi*, A.I.R. 1927 Nag. 41 (42), 97 I.C. 988. See also *Ballu Mal v. Ram Kishen*, 43 All. 263 cited in Note 188. In case of Mahomedans, the inspection of the *Khewat* alone is not sufficient; because in most cases coming from Mahomedan families the names of mother and sisters (who are also heirs of a

deceased Mahomedan) are never entered in the *Khewat*. The purchaser must take further precautions and make a better inquiry into the title of the transferors—*Rasulan v. Nand Lal*, 52 All. 548, 1930 A.L.J. 1091, A.I.R. 1930 All. 521 (522), 124 I.C. 757.

190. Good faith:—The purchaser must not only show that he was a purchaser for value, he must also prove his *good faith*—*Mulji v. Macleod*, 5 Bom.L.R. 991. A transferee who is aware of the fact that the transferor could not be the real owner of the properties is not protected under this section—*Mollaya v. Krishnaswami*, 47 M.L.J. 622, A.I.R. 1925 Mad. 95 (101), 85 I.C. 855. A mortgagee who lived in the same locality as the mortgagor and had been lending money to the mortgagor's family for a long time and was apparently acquainted with all the circumstances of the family, cannot claim to be a transferee for good faith without notice of the absence of title of the transferor—*Pateshri v. Nageshar*, 8 A.L.J. 358, 10 I.C. 961 (962); affirmed on appeal, 20 C.W.N. 265 (P.C.), A.I.R. 1915 P.C. 103, 34 I.C. 673 (675). A purchaser who was intimately connected with the affairs of the transferor, for about 14 years, and who prepared the sale-deed with the assistance of persons who knew everything that ought to be known about the estate of the transferor and knew that the latter had no power of alienation, cannot claim the benefit of the provisions of this section—*Hanuman v. Abbas*, 4 Luck. 452, A.I.R. 1929 Oudh 193 (202), 120 I.C. 387. A person who purchases property from another, knowing that with respect to it a suit had been filed by a third party against the vendor, cannot be said to have acted in good faith—*Ragho v. Dwarka Das*, A.I.R. 1924 Lah. 738, 79 I.C. 687.

191. Extent of the interest transferred:—A, the owner of certain property mortgaged it by conditional sale to B, under a conveyance and a separate agreement of re-sale within a stipulated time. A however, not finding money to redeem the property from B, abandoned his rights, and then B sold the property to C, who satisfied himself by looking into the conveyance (the agreement of re-sale not being produced) that B held the property under absolute ownership. Afterwards A sued to redeem the property from C. *Held* that this section applied, and C, being a purchaser in good faith from the ostensible owner B, got an absolute title, and *not merely a mortgagee's interest* in the property; and A, the real owner having stood by for a long time, and having enabled B to represent himself to others as an absolute owner ostensibly, could no more assail the title of C—*Sethu Madhava v. Bacha Bibi*, A.I.R. 1928 Mad. 778 (782), 111 I.C. 539. In other words, if the vendor professes to transfer and the purchaser in good faith purchases an absolute interest, he acquires absolute ownership, notwithstanding that his vendor had a lesser interest. But in an Allahabad case, the following opinion has been expressed by Niamatullah, J.:—"It is open to question whether, if the vendor possessed lesser interest than what he sold, the vendee's position would be better only because he was ignorant of the real state of his vendor's title. It is likewise open to question whether sec. 41, T. P. Act in terms applies to a case of this kind"—*Sahodra v. Badri Prasad*, A.I.R. 1929 All. 737 (739), 122 I.C. 593.

192. Burden of proof:—The transferee has to prove—(1) that the real owner allowed another person to hold himself out as the owner of the property, and (2) that the transferee purchased it for value from

the apparent owner in the belief that he was the real owner. And the real owner has to prove—(a) that the transferee had either direct or constructive notice of the real title or (b) that there were circumstances which put the transferee on inquiry which if prosecuted with due care and attention would have led to the discovery of the real title—*Md. Sujat y. Chandbi*, A.I.R. 1927 Nag. 41 (42), 97 I.C. 988. Where one man allows another to hold himself out as the real owner of a land, and a third person purchases it for value from the apparent owner, the burden of proving that the third person had actual or constructive notice of the real title is on the person (the real owner) who so allowed the other to hold himself out as the real owner. The fact that the person so held out (*i.e.*, the ostensible owner) was more than a mere *benamidar* and had a lien on the property for payments made by him does not make any difference in the principle of law above enunciated—*Raja of Karvetnagar v. Saravana*, 4 L.W. 200, 35 I.C. 893 (898) following *Ram Coomar v. McQueen*, 18 W.R. 166 (P.C.). It is not enough for the real owner to say that proper inquiry was not made by the transferee; it must be shown that there was something to call attention and invoke an inquiry; it must be shown that there were means of answering the inquiry; it must be shown what the inquiry would have revealed. If this onus is discharged by the real owner, then the burden will lie on the transferee to show that he took reasonable care within the meaning of this section—*Rajani Kanta v. Bashiram*, 49 C.L.J. 532, A.I.R. 1929 Cal. 636 (638), 121 I.C. 409.

42. Where a person transfers any immoveable property reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustrations.

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

43. Where a person *fraudulently* or erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees

in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but, on B's dying, A, as heir, obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

Amendment:—The words “fraudulently or” have been added by Sec. 13 of the T. P. Amendment Act (XX of 1929). See Note 196 below.

Analogous law:—This section may be compared with sec. 18 of the Specific Relief Act, which lays down:—“Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee has the following remedies—(a) if the vendor or lessor has, subsequently to the sale or lease, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest.....”

193. Principle—“Feeding the estoppel”:—The principle of this section is that if a man sells an estate to which he has no title, and after the conveyance acquires the title, he will be compelled to convey it to the purchaser. It is a doctrine of the Court of Equity that a person who enters into a contract without the power of performing it and subsequently acquires the power of performance, is bound to perform. Sugden's *Vendors and Purchasers*, (14th Ed.) p. 355. If a man who has no title whatever to property grants it by conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes—*Tilakdhari v. Khedan Lal*, 48 Cal. 1 (P.C.). It is an elementary principle of law that no party who has made a transfer to another is entitled to say that the transferee has no right to the property. This principle has been stretched so far as to enact a rule of law that where a person without owning a property purports to transfer it, he would be bound to make good the transfer if later he acquires that property. This principle is enunciated in sec. 43, Transfer of Property Act—*Shyam Lal v. Sohan Lal*, 50 All. 290, 25 A.L.J. 777, A.I.R. 1928 All. 3 (8), 106 I.C. 255.

The principle of this section is an extension of the doctrine of estoppel. The general principle underlying this section is that if a person sells an estate to which he has no title, and after conveyance acquires a title, he will in equity be compelled to convey it to the purchaser, because as between the transferor and the transferee, the transferor cannot plead a subsequent title to the estate—*Kali Sahu v. Girdhari*, 50 I.C. 778 (Pat.). This section is based on the doctrine that a subsequently acquired interest feeds the estoppel. When a grantor by a recital is shown to have stated that he is seised of specific estate, and the Courts finds that the parties proceeded upon the assumption that such an estate was to pass, an estate by estoppel is created between the parties in respect of any after-acquired interest of the grantor, and the newly acquired title is said to ‘feed the estoppel’—*Krishna Chandra v. Rasik Lal*, 21 C.W.N. 218, 23 C.L.J. 501, 33 I.C. 568 (573). The conveyance of a non-existent property though inoperative as a conveyance is operative as an executory agreement which

would attach to the property the moment it is acquired by the vendor and which in equity would transfer the beneficial interest to the vendee without any new act being done by the vendor to confirm the conveyance. There being, therefore, consideration for the contract, and the vendor having subsequently become possessed of the property, there cannot be any doubt that on these facts a Court of Equity would compel the vendor to perform the contract and that the contract would in equity transfer the beneficial interest to the vendee at the moment of the subsequent acquisition of the property by the vendor—*Rustom Ali v. Abdul Jabbar*, A.I.R. 1923 Cal. 535, 76 I.C. 499.

194. Scope of Section:—By virtue of sec. 2 (d), the rule enunciated in this section has no application to a case of compulsory sale, i.e., a sale in execution of a decree—*Alukmonee v. Banee Madhub*, 4 Cal. 677; *Prasanna Kumar v. Sreekanta*, 40 Cal. 173. Therefore, where the judgment-debtor had no transferable right on the date when the execution sale took place, but acquired such right after the sale, *held* that the auction-purchaser took nothing by the purchase—*Purna Chandra v. Soudamini*, 28 C.L.J. 283, 48 I.C. 335.

This section has no application to a case in which one person merely signs a sale-deed whereby another person who has no title professes to transfer the property as his own. Thus, where the sons who signed the sale-deed made no erroneous representation and did not profess to transfer and it was their mother who claimed to be owner and professed to make the transfer though she never was the owner of the property, this section did not apply—*Jabedali v. Prasanna*, 27 C.W.N. 433, A.I.R. 1923 Cal. 423, 75 I.C. 281.

This section applies to a transfer by way of lease—*Hatti Kudur Narain Rao v. Andar Syad Abbas*, 28 M.L.J. 44, 27 I.C. 785 (786).

The principle of this section applies to Hindu as well as Mahomedan conveyances—*Krishna Chandra v. Rasik*, 21 C.W.N. 218, 33 I.C. 568; *Viraya v. Hanumanta*, 14 Mad. 459; *Azizuddin v. Sheikh Budan*, 18 Mad. 492. In an earlier case (*Dooli Chand v. Brij Bhukun*, 6 C.L.R. 528) however, the Privy Council refused to apply the doctrine of estoppel to conveyances of Hindus. But see this case commented on in *Krishna v. Rasik*, 21 C.W.N. 218, 33 I.C. 568 (573).

'For consideration':—This section does not apply whether the transferor transfers without consideration—*Jagannath v. Dibbo*, 31 All. 53.

Any interest which the transferor may acquire:—This section applies if the transferor subsequently acquires any interest in the property sold. If, as a matter of fact, the property never subsequently comes into the hands of the transferor, this section cannot apply—*Ramakrishna v. Anasuyabai*, 26 Bom.L.R. 173, A.I.R. 1924 Bom. 300, 86 I.C. 265.

195. Sections 41 and 43 compared:—Section 43 protects a purchaser for value without notice, and there is no such provision in it as is found in section 41, requiring the transferee to take reasonable care to ascertain the power of his transferor to give a clear title—*Maung Ba v. Maung Po*, 14 Bur.L.R. 329. Under section 43, the transferee's mere belief in and acting upon a representation made by the transferor may be sufficient to pass the subsequently acquired interest, while under sec. 41 mere belief is not sufficient—*Pandari Bangaram v. Karumoory Subba Raju*, 34 Mad. 159 (160), 8 I.C. 388.

196. Fraudulent or erroneous representation:—The old section spoke of *erroneous* representation only, and no mention was made of *fraudulent* representation. Under the present section, the representation may be *either fraudulent or erroneous*.

“Section 43 refers to a person making an *erroneous* representation that he is authorized to transfer certain immoveable property. The underlying principle is also applicable to a case when the representation is fraudulent. The expression ‘erroneously’ has, in fact, been construed to include all representations whether tainted or untainted with fraud (I.L.R. 7 All. 864; 20 Cal. 296). It is, however, desirable to make the meaning clear by using the word ‘fraudulently’ along with the word ‘erroneously’”—*Report of the Special Committee* (1927).

It is not required that the representation should be erroneous and also fraudulent, for fraud is not a necessary ingredient of the law of estoppel. It is sufficient if the representation be simply erroneous—*Bhagwati v. Chaoli*, 55 I.C. 698 (Lah.). The existence of estoppel does not depend on the motive or on knowledge of the matter on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act, should have been *fraudulent*. The main question is whether the representation has caused the person to whom it has been made to act on the faith of it—*Sarat Chunder v. Gopal Chunder*, 20 Cal. 296 (310) (P.C.). Erroneous representation includes all misrepresentations whether tainted or untainted with fraud—*Radheylal v. Mahesh Prasad*, 7 All. 864; *Sarat Chunder v. Gopal Chunder*, 20 Cal. 296 (P.C.) (overruling *Ganga Sahai v. Hira Singh*, 2 All. 809 and *Vishnu v. Krishnan*, 7 Mad. 3); *Cairncross v. Lorimer*, L.R. 3 H.L. 829; *Pickard v. Sears*, 6 A. & E. 469; *Freeman v. Cooke*, 2 Exch. 654.

If the representation is neither fraudulent nor erroneous, this section has no application. Thus, where a sale-deed was executed by a certain person on behalf of a widow, and as her mukhtar (agent), this section did not apply as that person did not represent that he was authorised to transfer any other interest than that of his principal (the widow), and he did not profess to transfer any other—*Nurul Hosein v. Sheo Sahai*, 20 Cal. 1 (7) P.C.

Whether the representation was erroneous or not is a question of fact—*Saradamoyi v. Atul Chandra*, 68 I.C. 203 (Cal.).

Where no representation is made, there is no room for the operation of this section—*Krishna Pramada v. Dhirendra*, 56 Cal. 813 (P.C.), 33 C.W.N. 289 (293), 113 I.C. 465, A.I.R. 1929 P.C. 50.

Under this section, mere erroneous representation will suffice, and the representation need not be intentionally *false*—*Hattikudur Narain Rao v. Andar Sayad Abbas*, 28 M.L.J. 44, 27 I.C. 785 (786).

The transferee is entitled to the benefit of this section, if he believed in the representation made by the vendor, and was not aware of the true interest of the vendor with reference to the property—*Sundar Lal v. Ghissa*, 1929 A.L.J. 1087, A.I.R. 1929 All. 589 (591), 118 I.C. 705. The benefit of this section cannot be claimed by the transferee if he did not *believe in or act upon* the representation made by the transferor but was aware of the true interest of the transferor—*Pandiri Bangaram v. Karumoory Subbaraju*, 34 Mad. 159 (160); *Mulraj v. Indar*, 48 All. 150, 92 I.C. 471, A.I.R. 1926 All. 102. Thus, where A, who was entitled only

to one-third of the family property, mortgaged one-half of the property to C, who *knew* that A was entitled only to one-third and did not bargain and pay for a half share, and subsequently after the death of A's father, A became entitled to a half share, and C sued on his mortgage seeking to make A's half share liable, *held* that C could enforce his mortgage only against the one-third share, because he *did not believe* in the representation made by C as to a half share—*Pandiri v. Karumoory*, 34 Mad. 159. Although this section says nothing about the *belief* of the transferee in the erroneous representation, still a transferee desiring to take advantage of this section should allege and prove that he took the transfer in good faith believing in and being misled by the erroneous representation made by the transferor—*Hattikudur Narain v. Andar Sayad Abbas*, 28 M.L.J. 44, 27 I.C. 785 (788) (following 34 Mad. 159); *Krishnamachariar v. Thiruvengkatachariar*, 12 L.W. 149, 59 I.C. 275 (276); *Ladu Narain v. Goberdhan*, 4 Pat. 478, 6 P.L.T. 497, A.I.R. 1925 Pat. 470, 86 I.C. 721. The case of 34 Mad. 159 has also been followed in *Kodi Sankara v. Moiden*, 35 M.L.J. 120, 49 I.C. 147; *Venkata Lakshmi Narasayya v. Meenakshi*, 10 L.W. 221, 52 I.C. 992; and *Chakrapani v. Gayamani*, 48 I.C. 228 (Pat.). A mortgagee of a Deshgat Vatan knew that the property mortgaged to him was the life-interest of the mortgagor in his hereditary office. Subsequent to the mortgage the mortgagor became entitled to an enlarged estate. The mortgagee claimed to hold the enlarged estate against the mortgagor. *Held* that as the mortgagee knew at the time of the transaction that the land was inalienable beyond the life-time of the mortgagor, its subsequent enlargement enabling the Vatandar to alienate it permanently would not enlarge the mortgagee's interest so as to enure beyond the mortgagor's life-time—*Gangabai v. Baswant*, 34 Bom. 175 (182). But the Oudh Court has dissented from this view and holds that there is nothing in this section to the effect that it is necessary for the transferee to show that he *believed in and acted upon* the representation made by the transferor—*Jag Mohan v. Sita Ram*, 20 O.C. 72, 39 I.C. 186 (188) (dissenting from 34 Mad. 159).

If there is no erroneous representation, *i.e.*, if the truth is known to both parties, no question of estoppel can arise. Thus, where there being no legal necessity a mother contracted to sell immoveable property belonging to her infant son, not in her personal capacity but *as the mother and guardian* of the latter, and subsequently on the infant's death inherited the property, *held* that there could be no decree against her for specific performance of the contract for sale, and that as there was no erroneous misrepresentation made by the mother, and the true state of affairs was disclosed to the intending purchaser, this section had no application—*Rashmoni v. Surya Kanta*, 32 Cal. 382. In cases falling under this section the estoppel rests on the representation made by a transferor that he is authorised to transfer, which representation subsequently turns out to be erroneous. But where the truth of the matter is known to both parties, *e.g.*, where the transferee took the transfer with his eyes open and with full knowledge of the utter absence of any title in the transferor there can be no estoppel—*Dwarka Prosad v. Nasir Ahmad*, 11 O.L.J. 219, A.I.R. 1925 Oudh 16, 78 I.C. 850. Where a Hindu reversioner transfers his reversionary interest expectant on the death of a Hindu widow, and the present interest of the reversioner (which is a non-entity, till the widow's death) is known to both parties, there cannot be said to have been an *erroneous*

representation, and this section is inapplicable—*Jagannath v. Dibbo*, 31 All. 53. The transfer is also void under sec. 6.

This section applies where the transferor who is *not entitled to transfer* the property erroneously represents that he is entitled to transfer it; but where the transferor was *competent to transfer* the property (e.g. to grant a putni) but subject to the interest of a maintenance-holder, and he erroneously represented that the maintenance grant had been resumed (which was not true), this section did not apply—*Chota Bahira v. Purna Chunder*, 19 C.W.N. 1272, 27 I.C. 982 (986).

197. Application of the rule to sale:—Where a person possessing a limited interest transfers the property absolutely and afterwards acquires full title, he is estopped from setting up that there was no absolute transfer of property—*Ma Shwe v. Maung Kyin*, 8 Bur.L.T. 104, 26 I.C. 111. A, holding a certain mahal as a ghatwal, mortgaged it to B by way of a *Zuripeshgi* lease for twenty-one years. Shortly after the granting of the lease, the Zamindar got a decree against A, by which A's ghatwali right was extinguished. In execution of that decree, the Zamindar ousted A and took khas possession of the mahal. Some years afterwards, the Zamindar granted to A a perpetual mokaarari lease of the same mahal. *Held* that A must, out of his present estate in the mahal, make good the *Zuripeshgi*—*Loot Narain v. Showkee Lal*, 2 C.L.R. 382. Where a person, who had merely a *ghatwali* interest in certain land, mortgaged it on the representation that it was his *jagir*, and he subsequently got a mokaarari title to it, *held* that on a decree for sale upon the mortgage, the mokaarari interest of the mortgagor passed to the mortgagee—*Mokhada v. Umesh Chandra*, 7 C.L.J. 381. A Hindu father of a joint family consisting of himself and two minor sons, sold the entire property, representing that it was his self-acquired property. The purchaser sued for possession, and during the pendency of the suit one of the minor sons died. It was found that the sale was not binding on the sons. *Held* that this section applied, and the purchaser was entitled to a half-share of the property, although at the date of the sale he was entitled to the father's share which was at that time one-third—*Muthuswami v. Sandana*, 53 M.L.J. 218, A.I.R. 1927 Mad. 649, 101 I.C. 619. K sold the property of his brother D, who had disappeared for some time before the sale, under the representation that K was the owner of the property. Then D died leaving K his sole heir. *Held* that the purchaser was entitled to the aid of this section—*Sunder Lal v. Ghissa*, 1929 A.L.J. 1087, A.I.R. 1929 All. 589 (591), 118 I.C. 705. Where at the time of the sale the vendors had no under-proprietary right, but subsequently they acquired an under-proprietary right, and it was found that the vendors had at the time of sale erroneously but honestly represented that they had authority to transfer the holding, *held* that this section applied, and the under-proprietary right passed to the purchaser—*Balbhaddar v. Kusehar*, 3 Luck. 636, 5 O.W.N. 487, A.I.R. 1928 Oudh 344 (346). The plaintiff purchased the undivided share of A whose family consisted of A, B & C, and A's share at the time of sale was therefore one-third of the property. Subsequently by the death of B pending the suit A's share became one-half. *Held* that the plaintiff was entitled to a moiety of the property—*Virayya v. Hanumanta*, 14 Mad. 459. A vendee purchased specific lands from a coparcener of an undivided Hindu family, but in consequence of a partition suit in the family, the vendor (coparcener) was allotted lands other than those which he had sold to the vendee.

Held that the vendee was entitled to whatever was substituted by the decree for partition for the land which he had bought from the coparcener—*Manjaya v. Shanmuga*, 38 Mad. 684; *Sabapathi v. Thandavaroya*, 43 Mad. 309; *Dhandha Sahib v. Md. Sultan*, 44 Mad. 167 (168). A land was allotted to S under the Punjab Government Tenants Act. S induced his brother J to come and help him to reclaim the land, and promised to give J one-half of whatever he might obtain. J came to his brother S and settled in the land and shared all the expenses and labour of reclaiming the soil. Subsequently the Government conferred proprietary rights on S. Thereupon J claimed half share of the land. *Held* that although at the time when S made his promise to give J half of whatever right would accrue to him, he had no title to the land but a mere tenancy which was inalienable, still when he subsequently acquired a fresh interest by way of proprietary rights in the land he was bound to make good his promise to his brother by giving him a half share in the land—*Nathu v. Allah Ditta*, 3 Lah. 92, A.I.R. 1922 Lah. 287, 64 I.C. 18. Where the Official Receiver put certain properties of the insolvent to sale before an order vesting the properties in the Official Receiver was made, and afterwards the Official Receiver applied to the Court for a vesting order, and the order was made, *held* that although at the time of sale the Official Receiver had no power to sell owing to the absence of a vesting order, the order subsequently made had the effect of validating the sale, by operation of this section—*Sankaran v. Narasimhulu*, 50 Mad. 135 (F.B.), 51 M.L.J. 529, A.I.R. 1927 Mad. 1, 99 I.C. 8 (affirming 47 M.L.J. 749).

Exchange:—This section applies to *exchanges*. Thus, A obtained a certain property from B in exchange. B at the time of the exchange had only a half share in that property, but he subsequently purchased the other half. *Held* that as soon as the title of B to the whole property was perfected, the benefit thereof accrued to A—*Bhairab v. Jiban*, 33 C.L.J. 184, 60 I.C. 819.

198. Rule applicable to mortgages:—This section applies to mortgages. Thus, it has been held that any enlargement of the mortgagor's interest in the mortgaged premises usually enures for the benefit of the mortgagee—*Behari Lal v. Indra Narayan*, 31 C.W.N. 985, A.I.R. 1927 Cal. 665 (668). Therefore it is open to a mortgagee to enforce his charge on any interest which his mortgagor might subsequently acquire in the property which the latter had professed to mortgage, notwithstanding that he had no right in it at the time of such mortgage—*Kamala Prasad v. Nathuni Narayan*, 3 P.L.T. 401, A.I.R. 1922 Pat. 347 (348), 66 I.C. 149.

Where a person with a defective title purports and intends to mortgage a property, any interest subsequently acquired by him in that property is available in equity to make the mortgage effectual, even though the defect in the title was apparent on the face of the document—*Bhagwati v. Chaoli*, 55 I.C. 698 (Lah.). Where a person, who had a proprietary interest in another share of the property during the life-time of his brother's widow, mortgaged the whole property under the representation that he was authorised to mortgage the latter share also, and after the death of the widow, became the owner of that share, *held* that the mortgage operated on that share under the provisions of this section—*Sarju Prasad v. Bindeshari*, 33 All. 382 (384). Where at the date of a mortgage, the mortgagor had only a non-transferable interest in the property mortgaged, but subsequently acquired transferable interest in it and sold a portion of

the mortgaged property to a third party, *held* that the mortgage operated as a valid charge in favour of the mortgagee on the whole property including the portion sold to the third party—*Surendra v. Rajendra*, 27 C.L.J. 289, 43 I.C. 740. An undischarged insolvent is not “authorised to transfer” any property; consequently a mortgage executed by him is voidable at the option of the Receiver or the Court; but when the property reverts in him after discharge, the mortgage can be enforced against him by the mortgagee by sale of the property—*Rup Narain v. Har Gopal*, 55 All. 503, 143 I.C. 836, A.I.R. 1933 All. 449 (451). Where, after a mortgage, a portion of the mortgaged property was sold by the mortgagor to the mortgagee, and such property was resold by the mortgagee to the mortgagor, the mortgagee would have an equitable right to proceed against the whole property, including the portion sold to him and resold by him to the mortgagor. So long as the mortgagor had a less extent in his possession, the security was reduced to that extent; but when he subsequently became entitled to the full extent to which he had contracted to give the mortgage, the mortgagee became entitled to proceed against the security to such extent—*Deoli Chand v. Nirban Singh*, 5 Cal. 253. The whole of a certain house was mortgaged, the mortgagor having at the time an interest in only a fractional share in it. The mortgagee sued, and obtained a decree for the sale of the whole house. After that decree was passed and partially executed, the mortgagor, in virtue of a partition, acquired the remaining interest in the house. *Held* that this section applied and that the decree-holder was competent to continue execution of his decree against the mortgagor’s after-acquired interest—*Durga Das v. Muhammad*, 1908 A.W.N. 155. A Mahomedan first transferred his property as dower to his wife. He then mortgaged it by way of conditional sale which was subsequently foreclosed. The wife died one year afterwards and the Mahomedan succeeded to the property as heir to his wife. It was held that sec. 43 applied to the case and that the mortgagee was entitled to the property—*Sinclair v. Sitab Khan*, 3 C.P.L.R. 72. Where the plaintiff in a pre-emptive suit, in order to procure funds for the prosecution of his suit, executed a mortgage comprising certain lands of which he was owner and also the property which was the subject-matter of the suit for pre-emption, and the suit was successful, it was held that the mortgage took effect as regards the property which was the subject of the pre-emption suit, from the time when the plaintiff-mortgagor obtained possession by virtue of his decree in the suit—*Gayadin v. Kashi Gir*, 29 All. 163; *Bansidhar v. Sant Lal*, 10 All. 133. Where a person representing himself to be the absolute owner of certain property (to which at that time he had a chance of succeeding) mortgaged it, and subsequently acquired a title to such property by inheritance, *held* that the mortgage was enforceable against the mortgagor. Such a transfer was not a transfer of *spes successionis* forbidden by section 6, because what was purported to be transferred was an estate *in praesenti* and not a mere chance of succession—*Alamanaya Kunigari v. Murukuti*, 29 M.L.J. 733, 29 I.C. 439 (441). A Hindu woman executed a mortgage 5 years after the disappearance of her husband, and subsequently he was deemed as dead (after the lapse of 7 years, sec. 108 Evidence Act) at the date of the suit brought on the mortgage. *Held* that the mortgage was a valid mortgage at the date of suit by operation of this section, although it was not so when it was executed—*Mahadeo v. Har Bukhsh*, 4 O.W.N. 1077, A.I.R. 1928 Oudh 13 (14), 106 I.C. 489. Where a husband executed a mortgage on behalf

of his wife under a power of attorney given to him by his wife, but the power of attorney was invalid, and afterwards the husband succeeded to a one-fourth share of the property of his wife on her death, *held* that the power of attorney being invalid the mortgagee could not proceed against the property of the wife, but under sec. 43 T. P. Act he could enforce his mortgage against the one-fourth share which came into the possession of the husband—*Aisha Bibi v. Mahfuzunnissa Bibi*, 46 All. 310 (315), 22 A.L.J. 205, 78 I.C. 180, A.I.R. 1924 All. 362. The actual decision in this case is correct, but *quaere*, whether sec. 43 is applicable, there being no *erroneous representation* in the case.

As regards the mortgage of an undivided share in joint property, it is an incident of such mortgage that the mortgagee cannot follow his security into the hands of a co-sharer of the mortgagor who has obtained the mortgaged share upon partition; the mortgage lien is transferred to that portion of the joint property which the mortgagor obtains at the partition. Where the undivided share of one co-sharer was mortgaged and by subsequent partition the mortgaged property was allotted to another co-sharer, and there was a decree for sale of the mortgaged property, and the partition was effected after the mortgage-decree but before actual sale, the mortgaged share could not be sold under the decree as it had ceased to be the property of the mortgagor and had been allotted to another—*Bhup Singh v. Chedda Singh*, 42 All. 596 (599); also *Hem Chunder v. Thakomoni*, 20 Cal. 533; *Amolak v. Chandan*, 24 All. 483; *Pullamma v. Pradosham*, 18 Mad. 316; *Lakshman v. Gopal*, 23 Bom. 385. See also Note 392 under sec. 65. A mortgage by a manager of a Mitakshara family of the whole or a share of the joint family property is void and inoperative and gives the mortgagee no right even against the mortgagor's undivided share. But where the mortgagor's interest has subsequently been separated from that of the other members of the family by partition, his share may become available as security for the mortgage-debt—*Amar Dayal v. Har Prasad*, 5 P.L.J. 605, 58 I.C. 72; *Ram Ratan v. Ganga*, 26 O.C. 245, A.I.R. 1923 Oudh 265 (270), 71 I.C. 581.

199. Rule applicable to leases:—The rule in this section applies also to leases. Therefore where a lessor, who, at the time he granted the (*Zuripeshgi*) lease, had an infirm title, subsequently got into possession by a valid title, he could be compelled to carry out the contract, having attained a position in which he became able to do the same—*Lootnarain v. Showkee Lal*, 2 C.L.R. 382. If a person erroneously representing himself as authorised to grant a lease of property grants a lease and subsequently acquires the property, the lessee is entitled to have that property—*Protap Chandra v. Judisthir*, 19 C.W.N. 143, 23 I.C. 69. Thus, where the gaontia of a village granted a lease of bhogra land which purported to be permanent and heritable, and the gaontia was subsequently declared to have proprietary rights in that village, *held* that this section applied so as to create in the lessee a permanent transferable interest, and the descendants of the lessor were not entitled to eject the lessees—*Aditya Prosad v. Paramananda*, 4 P.L.J. 505 (510), 53 I.C. 96. A, B and C were owners of certain property in equal shares. A and C granted a lease of the entire property to E as if B had no interest therein and they themselves were entitled to it to his exclusion. Subsequently B died, making a will under which he left one half of his one-third share to A and the other half to C. *Held* that the provision of this section applied, and the share of B, when it vested in A

and C, became available to perfect their title and consequently the title of E in the entire property—*Sulin Mohan v. Raj Krishna*, 25 C.W.N. 420 (422), 60 I.C. 826 (828), 33 C.L.J. 193.

200. "Time during which the contract subsists":—The transferee's right endures only during the time the contract subsists. That is, the option of the transferee can be exercised in respect of an interest acquired by him, only during the time the contract subsists, but not afterwards. If, in case of a sale, the purchaser has repudiated the transaction and recovered the purchase money, or in case of a mortgage, the mortgaged properties have been sold in execution of the mortgage-decree (*Jadu Bans v. Sheojit*, 10 I.C. 443), the relation of transferor and transferee has ceased to exist, and the contract is no longer subsisting. In such a case no claim in respect of property acquired subsequent to the cessation of the contract can be made by the transferee.

The contract can be said to subsist so long as the decree obtained in a suit to enforce a transfer has not been fully satisfied, and until then the transferee is entitled to claim the benefit of any subsequent acquisition of interest in the property by the transferor. The words "at any time during which the contract subsists" are wide enough to cover a case in which the contract (*e.g.*, mortgage) has merged in a decree; the contract must be held to subsist all the same, till the mortgage is satisfied. Therefore, where the interest of the mortgagor came to be enlarged after the date of the decree on the mortgage, and before the decree was satisfied, *held* that the contract had not ceased to subsist, and the mortgagee was entitled to have the added interest sold—*Azizuddin v. Sheikh Budan*, 18 Mad. 492 (495). [It should be noted in this connection that the *Special Committee* considered this view of the Madras High Court as too wide, and remarked that the right of the transferee ought not to subsist after the passing of the decree, because "once a decree has been passed in a suit brought on the transaction as a completed transfer, the contract must be taken to have merged in the decree, whereupon new rights arise not under the contract, but under the decree." And the *Special Committee* sought to add a paragraph to that effect that the transferee should be entitled to claim the enlarged interest up to any time *prior to the passing of the decree*. But the *Select Committee* omitted the para remarking "it will unnecessarily restrict the operation of the principle of the estate feeding the title. A limitation of the right of a transferee to an interest which may accrue to the transferor up to the date of the decree in a suit instituted to enforce that right might work injustice, and we do not think that the decision in 18 Mad. 492 is sufficient justification for any amendment of the section in this respect."]

The option of the transferee must be enforced immediately on the acquisition of the transferable interest by the transferor—*Surendra v. Rajendra*, 27 C.L.J. 289, 43 I.C. 740.

201. Liability, when attaches and to whom:—The liability imposed by this section on the transferor is not a mere personal liability but is one which can be enforced against all persons claiming under the transferor otherwise than for value without notice—*Chota Bahira v. Purna Chunder*, 19 C.W.N. 1272, 21 C.L.J. 144, 27 I.C. 982 (987); *Radhey Lal v. Mohesh*, 7 All. 864. This section applies not only as between the original transferor and the original transferee but also binds the privies of the original transferor and can be taken advantage of by the privies of the

original transferee. Unless a statute expressly or by necessary implication precludes the application of provisions of law awarding to or imposing civil liabilities on the privies of the person to whom the rights are given or in whom the liabilities are imposed, the privies are entitled or bound as the case may be to the extent to which the original parties are so entitled or bound—*Hatti Kudur Narain Rao v. Andar Sayad Abbas*, 28 M.L.J. 44, 27 I.C. 785 (786). The right of the transferee to the after-acquired interest may also be enforced against the gratuitous transferees—*Sarat Chunder v. Gopal Chunder*, 20 Cal. 296 (P.C.).

202. Transfers forbidden by law:—The Court cannot, under the guise of sec. 43, uphold a transfer of property, the transfer of which is forbidden by law—*Balbhaddar v. Kusehar*, 3 Luck. 636, 5 O.W.N. 487, A.I.R. 1928 Oudh 344 (347); *Kusehar v. Balbhaddar*, 4 O.W.N. 1269, 107 I.C. 872, A.I.R. 1928 Oudh 153 (154). This section does not apply where there is a statutory prohibition to transfer the property on grounds of public policy. In such a case the principle of this section cannot be invoked to compel a person to transfer the property in fraud of the statute. Thus, the interest of a Hindu reversioner is an interest expectant on the death of a qualified owner; it is not a vested interest, but a *spes successionis* or a mere chance of succession, and as such inalienable under sec. 6 (a) of this Act. If therefore a reversioner conveys such interest and afterwards acquires the property on the death of the qualified owner, this section will not operate to give effect to the transfer—*Annada Mohan v. Gour Mohan*, 48 Cal. 536 (545, 551). Section 43 should not be so construed as to nullify section 6 (a) by validating a transfer initially void under sec. 6 (a)—*Ramasami v. Ramasami*, 30 Mad. 255 (262); *Official Assignee v. Sampth*, 65 M.L.J. 588, 145 I.C. 965, A.I.R. 1933 Mad. 795 (797); *Dwarka v. Nasir Ahmad*, 11 O.L.J. 219, 78 I.C. 850, A.I.R. 1925 Oudh 16 (18); *Bindeshwari v. Har Narain*, 4 Luck. 622, 6 O.W.N. 233, A.I.R. 1929 Oudh 185 (187). But a distinction should be drawn between (1) a transfer which is professedly one of a *mere right*, i.e., a transaction which on the face of it purports to transfer a right of reversion or of expectancy, and (2) a transfer of a *specific property* which the transferor erroneously represents he is authorised to transfer though he may for the time being have merely a reversionary right therein. Transfers of the former class would obviously fall within the purview of sec. 6 (a) and would be void *ab initio*, while those of the latter class would be governed by sec. 43. Unless this distinction is recognized, sec. 43 and its illustrations would be valueless—*Syed Bismilla v. Manulal*, 27 N.L.R. 199, 130 I.C. 822, A.I.R. 1931 Nag. 51 (52). See also *Bansidhar v. Ajudhia*, 27 O.C. 175, 82 I.C. 333, A.I.R. 1925 Oudh 120 (124). In a recent Madras case it has been observed that the illustration to sec. 43 is repugnant to the provisions of sec. 6 (a)—*Official Assignee v. Sampath*, supra.

A contract which is void *ab initio* cannot be validated by the provisions of this section. If the contract purports to transfer property which is inalienable according to law, that contract cannot be given effect to with respect to another property which the transferor may subsequently acquire—*Mohan Singh v. Sewa Ram*, 10 O.L.J. 424, 75 I.C. 579, A.I.R. 1924 Oudh 209 (216). A disqualified proprietor under the Jhansi Encumbered Estates Act (who is incompetent to transfer any property as long as the 'disqualification' lasts) mortgaged his property when his disqualification had not ceased. After the disqualification had ceased, the mortgagee

brought a suit for foreclosure relying on the provisions of this section. *Held* that such a mortgage being forbidden by the provisions of the law, this section could not protect a transfer which if permitted would defeat the provisions of the Jhansi Encumbered Estates Act—*Radha Bai v. Kamod Singh*, 30 All. 38. Similarly, a purchaser of inam land from the holder of a service *inam* who was prohibited by sec. 5 of Madras Act VI of 1895 from alienating the property, cannot claim a valid title to it on the ground that it was subsequently enfranchised and a patta for the land was granted to the alienor—*Narahari v. Siva Korithan*, 24 M.L.J. 462, 19 I.C. 881. A mortgage of village service inam lands in a proprietary estate is invalid and inoperative under the Madras Village Service Act (II of 1894) and a subsequent notification of enfranchisement under sec. 17 of that Act would not enure for the benefit of the transferee. No equities can arise out of a transaction which is prohibited by law, and section 43 of the T. P. Act has no application to such a case—*Sannamma v. Radha-bhayi*, 41 Mad. 418 (F.B.); *Batchu Ramayya v. Dara Satchi*, 25 M.L.J. 635, 21 I.C. 600; *Gopala Dasu v. Rami*, 44 Mad. 946 (948); *Ramayya v. V. Jagannadham*, 39 Mad. 930. A judgment-debtor to whom sec. 325A C. P. Code, 1882 (Sch. III, para. 11 of the Code of 1908) applies is a person 'disqualified' within the meaning of section 11 of the Contract Act, to the extent stated in sec. 325A, and any transaction entered into by him in contravention of that section is a nullity, incapable of subsequent ratification or of enforcement in equity, and sec. 43, T. P. Act has no application—*Salu Bai v. Bajat Khan*, 13 N.L.R. 130, 42 I.C. 200. [*Contra*—*Magniram v. Bakubai*, 36 Bom. 510. In this case it was held that after the disability has been removed by the Code, the judgment-debtor is bound to make good the conveyance which he had made during his disability.]

203. Bona fide purchaser without notice of the option:—The second paragraph of this section protects the rights of transferees in good faith for consideration who had no notice of the existence of the option to which the first paragraph of the section relates—*Durga Das v. Muhammad*, 1908 A.W.N. 155. Thus, the first defendant's father mortgaged to the plaintiff certain property in which he had then only a non-transferable interest, erroneously representing to the mortgagee that he had an absolute transferable right. The mortgagor, however, subsequently acquired a transferable mokarari right in the property. The mortgagor's sons transferred their interests in the property to defendants nos. 3 and 5 who were found to have had no notice of the mortgage in favour of the plaintiff. *Held* that the plaintiff was entitled to sue on his mortgage under this section, but his right was subject to that of defendants 3 and 5, and that the fact of non-repudiation of the mortgage or the institution of the suit was not in itself an evidence of the plaintiff's exercise of option under the first para. of this section—*Beni Rai v. Natabar*, 33 I.C. 975 (Cal.).

44. Where one of two or more co-owners of immoveable property, legally competent in that behalf, transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other

Transfer by one co-owner.

common or part-enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part-enjoyment of the house.

204. Scope of section:—This section which confers on the transferee the right of joint possession or partition to the extent enjoyed by the transferor, would apply to transferees of all kinds, including mortgagees and lessees—*Muhammad Jafar Khan v. Mazhar-ul-Hasan*, 3 A.L.J. 474. Thus, the lessee of an undivided share in a house acquires in respect of the share leased out to him the rights and liabilities of his lessor as provided by this section, and can maintain a suit for partition, if partition be necessary to give effect to the transfer—*Ibid*; *Ramasami v. Alagirisami*, 27 Mad. 361 (367).

Right to partition:—A lessee is entitled to have partition, though he is only a lessee for a term of years, and though that partition can only last for the period of his lease—*Ramasami v. Alagirisami*, *supra*.

The mere fact of the parties owning interests which are not co-ordinate in degree, ought not to be a bar to partition. The Court must in each case determine whether the balance of convenience is in favour of allowing partition. In the absence of inconvenience, there can be a partition between a superior landlord and a subordinate tenure-holder—*Hemadri v. Ramani Kanta*, 24 Cal. 575 (580) (F.B.). In the absence of proof of inconvenience to other co-sharers, a patnidar whose right extends over only a fractional share of one of many mouzahs in the Zemindary, is entitled to maintain a suit for partition—*Uma Sundari v. Benode Lal*, 34 Cal. 1026 (1028), following *Radha Kanta v. Bipro Das*, 1 C.L.J. 40.

This section cannot override the provisions of Hindu Law. Under the Hindu Law, a co-parcener cannot bring a suit for *partial* partition against the other members of the family for the ascertainment and allotment to him of *his portion alone* of the family property; he must bring a suit for partition of the *whole* family property. Section 44 gives to the purchaser of a co-parcener's share the "transferor's right to enforce partition of the same," which means a right to bring a suit for the partition of the whole family property (as is allowed by Hindu law) and not a right to sue for partial partition for allotment of his portion alone—*Venkatarama v. Meera Labai*, 13 Mad. 275.

"Legally competent in that behalf":—This qualification has been provided for the reason that in some provinces, in a joint Mitakshara family, a co-parcener cannot transfer his undivided interest in the joint family property.

205. Second Para:—The principle of the second para is deducible from the judgment of Westropp, C.J.:—"We deem it a far safer practice and less likely to lead to serious breaches of peace, to leave a purchaser to a suit for partition, than to place him by force in joint possession with the members of a Hindu family, who may be not only of a different caste

from his own, but also different in race and religion."—*Balaji v. Ganesh*, 5 Bom. 499 (504). Where the plaintiff, who was not a member of the family, purchased an undivided two-third share in huts used as residence by a joint Hindu family, *held* that he could not be given a decree for joint possession, regard being had to the second para of this section. The proper course is either to direct delivery of possession by *partition* in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition—*Girija Kant v. Mohim*, 20 C.W.N. 675 (678), 35 I.C. 294.

"The word 'undivided' really refers to the dwelling-house. If the dwelling-house has been completely divided and if the transferor's share has been completely marked off, so as to be capable of separate enjoyment, there can be no reason why the transferor should not have possession of it. What is meant is that where some members of a family live in a house and the house has not been partitioned, a stranger to the family cannot claim to occupy a portion of the house, without partition, simply because he has taken a transfer of a share of one of the members of the family"—Mukerji's *Law of Transfer*, 2nd Edn., p. 54. The words "dwelling-house belonging to an undivided family" do not imply that all the members of the family should *actually* live in the house. The requirements of this para are satisfied if the house is an undivided house and the members of the family occasionally reside in the house; it is not necessary for the application of this para, that the members should have *constantly* resided in the house nor is it necessary that they should be joint in mess. Thus, where a house belongs to two sisters A and B (who had inherited it from their father) of which A lives away in her husband's house, and the other sister B sells her undivided share to a stranger, the purchaser is not entitled to joint possession of the house with A, but is bound to make a partition—*Pakija v. Adhar Chandra*, A.I.R. 1929 Cal. 231 (233), 119 I.C. 574.

The words "undivided family" in the second para are of general application; they are not restricted to Hindus but apply to Muhammadans also—*Sultan Begam v. Debi Prasad*, 30 All. 324 (327).

45. Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

206. Scope of section:—This section defines only the *quantum* and not the quality of the interest of the joint transferees. It is silent on the question whether the transferee would take as joint tenants or as tenants-in-common.

This section applies to transfers *for consideration*, and its principle is inapplicable to gifts—*Gabriel v. Inas*, 34 Mad. 80.

207. Property acquired by common fund:—If a property is acquired out of a common fund by three brothers, they would be entitled to hold it in shares in proportion to their interests in the common fund—*Parshotam v. Janki*, 29 All. 354 (364), 4 A.L.J. 257. The same rule would apply to a property acquired by the partnership. If any partner of a partnership alleges a specific agreement that the shares were to be unequal, the burden lies upon him to prove his allegation—*Jadobram v. Bulloram*, 26 Cal. 281.

208. Para. 2:—In the absence of any specification in the sale-deed of the shares purchased by two persons, it must be held that both purchased equal shares—*Abdullah v. Ahmad*, 1929 A.L.J. 1196, A.I.R. 1929 All. 817 (818), 122 I.C. 666. Para 2 may be illustrated by the following case: An estate was divided into several shares and one of them was left as the *ijmali kalam*, and for others separate accounts had been opened with the Collector, and the owners of the *ijmali kalam* having failed to pay their share of the revenue it was put up to sale but could not fetch a price sufficient to cover the sum in arrears and each of the co-sharers paid the entire amount of arrears separately, and the Collector issued a certificate of sale jointly to them: *Held* that the different sharers should be entitled to equal shares in the purchased estate irrespective of their shares in the parent estate. If there is no evidence upon the record to show how the amount was made up by the Collector from the funds which the parties respectively advanced, the presumption ought to be that each of the parties is equally interested in the property purchased—*Debi Pershad v. Aklio*, 4 C.W.N. 465.

The second para applies in *the absence of evidence* as to the interest, etc. If there is no absence of evidence, *i.e.*, if the evidence is available but has not been produced by the parties, the presumption under the second para. cannot be made—*Ram Pher v. Ajudhia*, 12 O.L.J. 66, A.I.R. 1925 Oudh 369, 87 I.C. 17. If necessary attempt had been made to prove the different shares of the vendees, and the vendees failed to declare them, then it might have been possible to apply this para.—*Ibid.*

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in consideration equally where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Transfer for consideration by persons having distinct interests.

Illustrations.

(a) A, owning a moiety, and B and C each a quarter share of mouza Sultanpur, exchange an eighth share of that mouza for a quarter share of mouza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mouza.

(b) A being entitled to a life-interest in mouza Atrali, and B and C, to the reversion, sell the mouza for Rs. 1,000. A's life interest is ascertained to be worth Rs. 600; the reversion, Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money; B and C to receive Rs. 400.

209. This section is the reverse of sec. 45 which lays down a similar rule of proportion.

Distinct interests:—The estate of co-widows in Hindu law taking their husband's property by inheritance is one estate subject to the right of survivorship, and their interest in the estate is not distinct but joint, and they are in law co-parceners—*Bhugwandeem v. Myna Bibec*, 11 M.I.A. 487; *Gajapathi Nilmani v. Gajapathi Radhamani*, 1 Mad. 290 (P.C.); *Ram Piyari v. Mulchand*, 7 All. 114.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Transfer by co-owners
of share in common
property.

Illustration.

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mouza Sultanpur, transfer a two-anna share in the mouza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer, one-anna share is taken from the share of A, and half-anna share from each of the shares of B and C.

Note:—In the case of transfers falling under this section, the transfer takes effect not according to the *quantum* of consideration received by each co-owner but according to the extent of the share of each co-owner. This rule was probably enacted to guard against the complications which the former course would entail. For the value of two shares otherwise equal may considerably vary, and if inquiry have to be made as to the value of each share, much unnecessary inconvenience and delay would become inevitable—Gour's *Law of Transfer*, (6th Edn.) Vol. I, p. 509.

210. Enlargement of transferor's share after the date of transfer:—Since a transfer falling under this section takes effect not according to the quantum of consideration taken by each transferor, but according to the extent of the share of each transferor, it follows that if during the time the contract of transfer subsists, the share of a transferor becomes enlarged, the transferee is entitled to the enlarged share, on the analogy

of the principle enunciated in sec. 43. Thus, where the plaintiff purchased certain property belonging to the family consisting of the transferor, his adopted son and his uncle, and brought the suit for possession of the property so purchased against the said persons, and the adopted son and the uncle contested the suit on the ground of want of legal necessity for the sale, and the uncle died pending the suit, *held* that apart from the question of necessity, the transfer operated on one-half of the property, as the transferor's interest in the property increased from one-third to one-half owing to the death of the uncle—*Viraya v. Hanumanta*, 14 Mad. 459. Similarly, a mortgage bond was executed by a Mahomedan woman and her eldest son, on account of a debt due by the deceased husband of the former. Three other children of the deceased were also joined as defendants in a suit on the mortgage, but the decree made the mortgage amount payable on the *responsibility of the shares* of the mortgagors and the suit was otherwise dismissed and no personal decree was passed. Subsequently before the decree was executed one of the three sons whose shares in the property were exonerated from liability for the debt, died and his share in the mortgaged property devolved upon the co-mortgagors whose shares consequently were increased. It was held that the increased shares of the co-mortgagors were liable to be attached and sold in execution of the decree—*Ajijuddin v. Sheik Budan*, 18 Mad. 492.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later-created right shall, in the absence of a special contract of reservation binding the earlier transferees, be subject to the rights previously created.

Priority of rights
created by transfer.

211. Principle:—This section is a statement of the rule expressed in the maxim *Qui prior est tempore potior est jure* (he who is prior in time is better in law). One who has the advantage in time should also have the advantage in law. When two successive transfers of the same property have been effected by way of mortgage or sale the later in date must give way to the earlier—*Sirbadh Rai v. Raghunath*, 7 All. 568 (572); *Karamat v. Samiuddin*, 8 All. 409; *Narayan v. Luxuman*, 29 Bom. 42; *Motichand v. Sagun*, 29 Bom. 46.

212. Application of principle:—(1) This section applies when there are *completed valid* transfers. The word “transfer” in this section contemplates a complete transfer, and does not include a mere contract for sale or a sale by an unregistered sale-deed the registration of which is compulsory. If a contract of sale to one person is followed by complete sale to another, the case will be governed by sec. 40 and not by this section. A registered deed of sale shall take effect as *against* (and not *subject to*), a mere contract of sale or an unregistered conveyance (see secs. 48 and 50 of the Registration Act). See also *Waman v. Dhandiba*, 4 Bom. 126 (F.B.); *Chundernath v. Bhoirab*, 10 Cal. 250; *Ram Autar v. Dhanauri*, 8 All. 540.

(2) The rule is applicable only when the two transfers are *antagonistic* and not where legal effect can be given to one without infringement of the other. Compare the words of the section “and such rights

cannot all exist or be exercised to their fullest extent together." Thus, in a case where a property is mortgaged to one and subsequently sold to another, this section will not apply, because the purchaser has obtained only the equity of redemption, an interest which can exist side by side with the mortgage—*Ramchandra v. Krishna*, 9 Mad. 495; *Sobhagchand v. Bhaichand*, 6 Bom. 193 (208). But where usufructuary mortgages of the same property are created in favour of different persons, the two rights cannot co-exist and the subsequent mortgage will give way and the prior mortgage will prevail—*Sirbadh Rai v. Raghunath*, 7 All. 568 (572).

There is no conflict between a validly registered conveyance and an unregistered sale-deed of which registration is compulsory, because the latter is a nullity; and this section need not be invoked to determine their priority.

This section applies in the absence of a special contract or reservation binding the earlier transferees. And so, where a mortgage is executed by a Receiver under an order of Court directing that such mortgage should constitute a first charge, it takes priority over any other mortgage of earlier date—*Giridhari v. Dhirendra*, 34 Cal. 427 (441). To the general rule '*qui prior est tempore potior est jure*' there is a notable exception to be found in advances made to save the mortgaged property from loss or destruction. These advances are payable in priority to all other charges of earlier date, and amongst themselves have precedence according to the inverse order of their respective dates—*Ibid*, following Fisher on Mortgages, 4th Edn. p. 958.

213. "At different times":—Where two deeds relating to the same property were executed on the same day, it must be proved which was in fact executed first, but if the deeds themselves show an intention either that they shall take effect *pari passu* or even that the later deed shall take effect in priority to the earlier, then it will be presumed that the deeds were executed in such order as to give effect to that intention—*Gartside v. Silkstone & Co.*, 21 Ch. D. 761; *Ramratan v. Bishnuchand*, 11 C.W.N. 732.

Where two deeds bearing different dates were registered on different days, priority as between them is ascertained with reference to the dates of the deeds and not with reference to the dates on which they were respectively registered; and this priority is not influenced by the fact that the party having the later deed is in possession of the property—*Narayan v. Lakshuman*, 29 Bom. 42; *Santaya v. Narayan*, 8 Bom. 182.

49. Where immoveable property is transferred for consideration, and such property or any part thereof is, at the date of transfer, insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

214. Two questions may arise under this section:—(1) If the house is destroyed after the contract of sale, but before it is completed

by payment of purchase-money; (2) If the house is destroyed after the sale is completed by payment of purchase-money.

(1) If the house is destroyed before the transfer is complete by payment of purchase-money, this section has no application, because it speaks of cases 'where immovable property is transferred' i.e., actually transferred. A mere contract of transfer confers no interest in the property on the purchaser. See sec. 54 *infra*.

(2) After the purchaser has paid the purchase-money, and the ownership has passed to him, he is bound to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller. See sec. 55 (5) (c) *post*. But if the property is insured against loss or damage by fire, and the money payable under the policy is received by the vendor, this section comes in and entitles the purchaser to require the vendor to apply the money in re-instating the property.

215. "Which the transferor actually receives":—This section does not give the transferee of insured property any direct claim against the insurer, but it provides only for the case where the money payable under the policy has been actually received by the transferor. The vendor is liable for the money *actually* received by him under the policy. It may well happen that after the vendor has sold the property and received full consideration thereof, he may not care to enforce payment of the insurance money from the insurer. In such a case, the purchaser can neither compel the vendor to enforce his claim against the Insurance Company, nor can the purchaser claim the insurance money directly from the company. It is only when the vendor cares to enforce his claim against the Insurance Company and actually receives the money from the company that the purchaser can claim the benefit of this section. The safest course for the purchaser is to get the policy of insurance assigned over to him at the time of purchase.

Where the owner of a mill insures it against fire, and subsequently mortgages it to a third person, and the mill and the premises are destroyed by fire, the Insurance company is not liable to indemnify the *mortgagee* against the loss. The contract is one to indemnify the *insured*, and not any other person between whom and the company there was not privity of contract—*Chctiy Firm v. Motor Union Insurance Co.*, 1 Bur.L.J. 28, 67 I.C. 777, A.I.R. 1923 Rang. 6.

50. No person shall be chargeable with any rents or profits of any immovable property which he has, in good faith, paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Rent bona fide paid to holder under defective title.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

Note:—This section is taken almost word for word from section 1

of the Mesne Profits and Improvements Act (IX of 1855), which has been repealed by this Act.

216. Scope:—The language of this section is general. It even applies to a case where there has been no *assignment* by the lessor during the tenancy, but the case is merely one of succession and the rent is paid to a person who is the ostensible or *de facto* owner—*Kaveriamma v. Lingappa*, 33 Bom. 96 (104). See this case cited in Note 217 below.

But this section has no application to payment of rent made *in advance*. It is a well-known principle of English law that the payment of rent before it becomes due is not a fulfilment of the obligation imposed by a covenant to pay rent, but is in fact an advance to the lessor with an agreement on his part that when the rent becomes due such advance will be treated as a fulfilment of the obligation to pay the rent—*De Nicholls v. Saunders*, (1870) L.R. 5 C.P. 589; *Cooke v. Guerra*, (1871) L.R. 7 C.P. 132. A payment of rent in advance is in effect *a loan to the landlord* to be applied thereafter in discharge of the tenant's obligation to pay rent as it accrues due, but it is not in itself a fulfilment of an obligation to pay rent, in as much as the obligation has not arisen at the time of the payment. As against the landlord and his legal personal representatives, a tenant who pays rent in advance is secure, because as the rent becomes due, the previous advance becomes actual payment. But if the landlord should assign his rights, the assignee will, by giving notice to the tenant, before the proper rent-day, to pay rent to him, become entitled to the rent then falling due—*Tiloke Chand v. Beattie & Co.*, 29 C.W.N. 953, 94 I.C. 538, A.I.R. 1926 Cal. 204; *Ram Lal v. Mahadeo*, 3 P.L.T. 128, 63 I.C. 587 (588); *Pale Zabaing Rural Co-operative Society v. Maung Thu Daw*, 9 Rang. 470, A.I.R. 1931 Rang. 292; *Kiran Chandra v. Dutt & Co.*, 29 C.W.N. 94, 85 I.C. 522, A.I.R. 1925 Cal. 251 (253); *Govind v. Gopal Rao*, 14 C.P.L.R. 65; *Official Assignee v. Abdul*, A.I.R. 1928 Sind 95 (96), 107 I.C. 209. (If, however, the transferee has *notice*, actual or constructive, of the agreement between the landlord and tenant under which the tenant paid a large sum as rent in advance, the transferee is not entitled to realise the rent over again from the tenant—*Tiloke Chand v. Beattie & Co.*, 91 I.C. 113, A.I.R. 1927 Cal. 270 (273); *Kiran Chandra v. Dutt & Co.*, *supra*; *Nand Kishore v. Anwar*, 30 All. 82 (at p. 83).

But this section applies where the rent is realised in advance from the tenant *as a condition* of his entering into the premises. Thus, where the mortgagor of certain mortgaged premises let them to a tenant after receiving 5 months' rent in advance as a condition precedent to such letting, and subsequently a Receiver appointed in the mortgage-suit relating to those premises sued for recovery of the said rent: *held* that the lessee having paid the rent in advance only as a part of his entering into the contract of hiring the premises, could not be compelled to pay it over again to the Receiver. If a lessee pays his rent before it is due, it may well be said that the tenant does not pay in fulfilment of an obligation upon him, and that such payment must be regarded as an advance to the lessor with an agreement that on the day when the rent becomes due, such advance shall be treated as a fulfilment of the obligation to pay rent. But when it is a part of the contract, as in the present case, that the lessee should pay the rent in advance, and the lessee pays in advance, he does so in fulfilment of an obligation under the contract. In such a case, sec. 50 protects him from having to pay it over again to any person who may

subsequently become entitled to the rents and profits of the property leased—*Toon Chan v. P. C. Sen*, 7 Bur.L.T. 139, 24 I.C. 693 (694).

217. Rents paid in good faith:—*Payment made without notice of transfer:*—If, after transfer of his right, title and interest in any estate, the proprietor receives rent from a tenant which is due to his transferee, he is liable to account to that person for monies so received, but the law affords protection to the tenant making such a payment by providing that the receipt of the transferor shall afford full indemnity to the tenant making such payment of rent without notice of the transfer—*Alimuddeen v. Heeralal*, 23 Cal. 87, 101 (F.B.). Payments made by tenants to a mortgagor after the mortgage but before they have any notice of it, will be valid against the mortgagee—*Kiran Chandra v. Dutt & Co.*, 29 C.W.N. 94, 85 I.C. 522, A.I.R. 1925 Cal. 251. If the purchaser omits to give notice of his title to the tenants, and the tenants misled by the want of such information continue to pay their rents to the former proprietor, the purchaser must bear the consequences of his neglect—*Collector v. Hursoondery*, 1864 W.R. (Act X Rulings) p. 6.

Payment to ostensible owner:—In a suit for mesne profits or rent brought by the real owner of land against a tenant, it is a good defence for the latter to aver that he had, without notice of any adverse claim, paid over the rent or profits to one of whom he in good faith had held the property, although the latter had really no right to it. Thus, S who was in possession of a property as mortgagee, let the property to the defendant for 12 years. After some years S died, and his interest as mortgagee survived to his younger brother R. Since the death of R, S's widow G took possession of the property, got her name recorded as owner, and recovered rent from the defendant for the years 1902 and 1903. The person who was really entitled to the property at R's death was his sister, the plaintiff. She sued to recover rent for the years 1902 and 1903 from the defendant and it was found that the defendant in making the payment to G had acted in good faith and had no notice of the plaintiff's interest in the property. *Held* that this section applied to the case and that the defendant was not chargeable with the rent sued for—*Kaveriamma v. Lingappa*, 33 Bom. 96 (103, 104).

218. Payment made after notice of transfer:—It is immaterial whether the tenant gets notice from the transferor or from the transferee. In either case, he cannot escape liability. Thus, the tenant cannot successfully plead that he has paid the rent *bona fide* to the assignor, if he has received notice of the assignment from the assignee—*Pope v. Biggs*, (1829) 9 B. & C. 245; *Peary Lal v. Madhoji*, 17 C.L.J. 372, 19 I.C. 865 (868). Similarly, if the tenant gets notice of the transfer from the transferor (and not from the transferee), any payment of rent made by the tenant to the transferor thereafter is not a valid payment made in good faith, and the transferee is entitled to claim the same from the tenant—*Nabin Chandra v. Surendra*, 7 C.W.N. 454. Payments made by the tenant either in collusion with his grantor or after receiving notice of the right of a third party are not protected under the section—*Moss v. Gallimore*, 1 Doug. 279; *Pope v. Biggs*, 9 B. & C. 245; *Cook v. Guerra*, L.R. 7 C.P. 132.

219. Procedure:—Where the tenant alleges that the rent for the year in question has been paid to the previous landlord (the vendor of the plaintiff), the suit for rent can be framed alternatively against the tenant

and his previous landlord. Where in such a case the Court finds that the tenant has in fact paid the rent to the previous landlord in good faith, the plaintiff is entitled to a decree against the previous landlord alone for the amount paid to him, the tenant being discharged—*Madan Mohan v. Holloway*, 12 Cal. 555.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

This section is almost the same as sec. 2 of the Mesne Profits and Improvements Act (IX of 1855), which has been repealed by this Act.

In England, similar provisions are to be found in the Improvement of Land Act 1864 (27 & 28 Vict. c. 114), and the Settled Land Act 1882 (45 & 46 Vict. c. 38).

This section may be compared with section 82 of the Bengal Tenancy Act (VIII of 1885) which deals with compensation for raiyat's improvements.

220. Principle:—This section is based upon the principle that he who will have equity must do equity. 'A constructive trust may arise where a person, who is only a part owner, acting *bona fide*, permanently benefits an estate by repairs or improvements; for a lien or trust may arise in his favour in respect of the sum he has expended in such repairs or improvements. (*Lake v. Gibson*, 1 Eq. Ca. Ab. 290). Although a person expending money by mistake upon the property of another has no equity against the owner who is ignorant of and did not encourage him in his expenditure (*Nicholson v. Hooper*, 4 My. & Cr. 186) yet if it were necessary for the true owner to proceed in equity he would only be entitled to its assistance according to the ordinary rule by doing equity and making compensation for the expenditure, so far of course, and only so far, as the expenditure was necessary and has proved permanently beneficial. But a person will have no equity who lays out money on the property of another with full knowledge of the state of the title (*Rennie v. Young*, 2 DeG. J. & S. 136; *Ramsden v. Dyson*, L.R. 1 H.L. 129; *Price v. Neault*,

12 App. Cas. 110) ; or who lays out money unnecessarily or improperly"—*Snell's Equity*, pp. 148, 149.

The principle of this section is an exception to the maxim "*Quicquid inaedificator solo solo credit*." And unless the equitable grounds mentioned in this section are made out, the moment the improvements are made they belong to the owner of the land by operation of law—*Dharma Das v. Amulya*, 33 Cal. 1119 (1130) ; *Maung Aung v. Ma Nyun*, A.I.R. 1928 Rang. 141 (142), 117 I.C. 56.

221. Application of this section:—This section applies to both Hindus and Mahomedans, since there is no rule of Hindu or Mahomedan law which precludes persons from claiming the benefit of the equitable principle embodied in this section—*Durgozi v. Fakeer Sahib*, 30 Mad. 197 (199).

In view of sec. 2 (d), this section cannot apply to a transfer in execution of a decree, and the word 'transferee' does not include an auction-purchaser of the property at Court-sale—*Nannu Mal v. Ram Chander*, 53 All. 334 (F.B.), 132 I.C. 401, A.I.R. 1931 All. 277 (283) ; *Moitheensa v. Apsa Bibi*, 36 Mad. 194 (197), 21 M.L.J. 969, 12 I.C. 444.

This section applies even though the transferor himself is the evictor. The words "the person having a better title" should not be interpreted to mean a person other than the transferor. There is no reason to cut down the operation of the section in this way—*Harilal v. Gordhan*, 51 Bom. 1040, 29 Bom.L.R. 1414, A.I.R. 1927 Bom. 611 (612), 105 I.C. 722.

This section does not apply unless the transferee is evicted by a person having a *better* title. Therefore where a mortgaged property is sold to the defendant who has no notice of the mortgage, and who makes improvements on the property, and then the mortgagee brings a suit for sale on his mortgage, section 51 does not apply as it cannot be said that the defendant is liable to be evicted by a person having a better title, the mortgagee bringing a suit on his mortgage not being treated as a person having a better title than the defendant. Nor can it be said that the defendant is liable to be *evicted* from the premises by the institution of the suit, (because the mortgagee can only bring the mortgaged property to sale but cannot evict the defendant), although he may ultimately be evicted at the instance of the auction-purchaser. Sec. 51 cannot therefore in terms apply to this case, but the rule of equity on which this section is based may be applied, and the Court will order the plaintiff to pay the costs of improvement to the defendant as a condition precedent to his bringing the mortgaged property to sale—*Kalyan Das v. Jan Bibi*, 51 All. 454, 1929 A.L.J. 105, A.I.R. 1929 All. 12 (14), 112 I.C. 765.

Persons entitled to the benefit of this section:—In order to entitle a person to the benefit of this section (*i.e.*, to the improvements made by him or to their value) three things are necessary. These are discussed below in detail:—

222. Firstly, he must be a "transferee":—A mere stranger or a trespasser, or a person having no status in respect of the immovable property is not entitled to the benefit of this section—*Thakoor Chunder v. Ramdhone*, 6 W.R. 228 ; *Mudhoo Sudan v. Juddooputty*, 9 W.R. 115. Thus, if a Hindu son (governed by the Dayabhaga School) had made improvements and substantial additions to ancestral buildings standing on ancestral lands belonging to his father, the father would be under no

legal obligation to pay for them as a condition precedent to a decree for recovery of possession, and he would be entitled to a decree for ejectment even though the additions and improvements were effected with his knowledge—*Dharma Das v. Amulya*, 33 Cal. 1119 (1130). No one can, by merely trespassing on another's land and constructing costly buildings on it, claim a right to retain possession or to compel the owner to pay compensation—*Ganga Din v. Jagat Tewari*, 12 A.L.J. 1026, 25 I.C. 198.

So also, an assignee from the trespasser is not protected by this section—*Souza v. Gulam Moidin*, 13 M.L.J. 214.

It is immaterial whether the transfer is *valid* or not. In either case the transferee can claim compensation for his improvements—*Ramanathan v. Ramasami*, 30 M.L.J. 1, 32 I.C. 5; *Ramanathan v. Ranganathan*, 40 Mad. 1134 (in this case the transfer was by an unregistered deed of exchange). Therefore if a person claiming under a purchase which is invalid under Mahomedan Law and making improvements on the purchased property in the *bona fide* belief that he is absolutely entitled thereto, is sought to be evicted by a person having a better title, he is entitled, on his being so evicted, to require such person to pay the value of the improvements—*Durgozi v. Fakeer Sahib*, 30 Mad. 197 (200). Where a person entitled only to a life-estate sold the property absolutely to the vendees, *held* that although the sale was invalid, the plaintiff was entitled to recover the land on payment of the value of the improvements *bona fide* effected on the land by the vendees—*Nanjamma v. Nacharammal*, 17 M.L.J. 622.

A mortgagee who has purchased the mortgaged property at a sale held in execution of the decree upon his mortgage, ceases to be a mortgagee and becomes the owner, and cannot claim the value of improvements effected by him after his purchase, from a second mortgagee who brings the property to sale—*Rangayya v. Parthasarathi*, 20 Mad. 120 (123).

223. Secondly, he must believe himself to be absolutely entitled to the property.

"For if a stranger builds on my land *knowing it to be mine*, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights. It follows as a corollary from these rules, that if my *tenant* builds on lands which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end"—*Per* Lord Cranworth L.C. in *Ramsden v. Dyson*, (1866) L.R. 1 H.L. 129 (141). "If a tenant, being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of law or equity can enforce"—*per* Lord Kingsdown in *Ibid* (at p. 171). When both parties are conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel. That is, when the title of the true owner is brought to the knowledge of the persons making the improvements, there is no ground for invoking the doctrine of estoppel and acquiescence—*Ranchodlal v. Secy. of State*, 35 Bom. 182 (187, 188).

A person who is aware of the imperfection of his title or who knows that his title is terminable some day or other is not entitled to the benefit of this section—*Onkar Mal v. Secretary of State*, 56 I.C. 813 (Pat.). A person who purchases from a Hindu widow, fully knowing that she is in possession of the property as a Hindu widow having only a life-interest, cannot claim the value of the improvements made by him upon the property—*Raj Kishore v. Jaint Singh*, 36 All. 387 (395). See also 44 All. 665 and 47 All. 430 cited in Note 224 *infra*. A person who plants trees and makes improvements on another's land, knowing that he has no valid title to it, cannot claim the value of the improvements—*Munna v. Suklal*, A.I.R. 1924 Nag. 142 (145). A person who never had any title and was in possession by permission of the real owner cannot believe himself to be absolutely entitled to the property—*Murlidhar v. Parmanand*, 34 Bom. L.R. 164, A.I.R. 1932 Bom. 190, 137 I.C. 560. For, there is no equity in favour of a person who with full knowledge of the state of his title spends money upon the property while he knows that it belongs to another, or who incurs expenditure which is either unnecessary or improper. The test is, whether the person has acted in the *bona fide belief* that he is entitled to the property—*Sitla v. Samiuddin*, 4 O.L.J. 514, 42 I.C. 428.

Thus, this section does not give a *lessee* or a *tenant* a claim to compensation in any case, because the lessee or tenant certainly knows that his lease or tenancy is terminable, and cannot possibly believe in good faith that he is *absolutely* entitled to the property—*Nundo Kumar v. Bonomali*, 29 Cal. 871 (884); *Narasayya v. Raja of Venkatagiri*, 37 Mad. 1 (12); *Ismail Khan v. Jaigun*, 27 Cal. 570 (586); *Sheik Husain v. Govardhandas*, 20 Bom. 1; *Beni Ram v. Kundan Lal*, 21 All. 496 (502) (P.C.); *Bhubaneshwar v. Lal Bahadur*, 51 I.C. 380; *Bonomali v. Nihal Singh*, 48 I.C. 354 (Nag.). Where a tenant knowing that he has no occupancy rights makes improvements in the land without any hope or expectation created or encouraged by the landlord, he cannot claim any compensation on eviction—*Narasayya v. Rajah of Venkatagiri*, 37 Mad. 1 (14). So also, a tenant who is under a mistaken belief that he has a much longer period of tenure than he actually has, does not come under the protection of this section; he must believe that he is *absolutely* entitled to the land within the meaning of this section so as to entitle him to compensation for improvements—*Jugmohandas v. Pallonjee*, 22 Bom. 1. Where an agreement to sell the mortgaged property to the mortgagee is executed by two out of three coparceners, and the mortgagee is aware of the existence of the third brother, the mortgagee cannot be said to have believed in good faith that he was entitled to the whole of the property—*Ramappa v. Yellappa*, 52 Bom. 307, 30 Bom.L.R. 427, 109 I.C. 532, A.I.R. 1928 Bom. 150 (152). But where a person believed in good faith that he has in the property the absolute interest of a permanent tenant and in such faith created a permanent building on the site, he would be entitled to compensation if it should be ultimately held that he had no permanent interest and must surrender the land—*Ismail Kani v. Nazarali*, 27 Mad. 211 (221); *Ismail v. Jaigun*, 27 Cal. 570 (584); *Raja Rudra Partab v. Devi Prosad*, 8 O.C. 13. A transfer by a Hindu father and manager of joint family, though without necessity, is a valid transfer, until it is avoided by the son, and so long as it is not avoided, the transferee is absolute owner and may believe himself to be absolutely entitled to the property. It makes no difference that he failed to satisfy

himself at the time of the sale that it was necessary for the family. If the transferee makes any improvements during the time the sale is not avoided, he can claim the value of improvements if the son afterwards brings a suit to recover the property—*Lachmi Prasad v. Lachmi Narain*, 25 A.L.J. 926, A.I.R. 1928 All. 41 (43), 107 I.C. 36.

Similarly, a *mortgagee* is not entitled to the benefit of this section and cannot claim the crops grown by him on the land of his mortgagor—*Ramalinga v. Samiappa*, 13 Mad. 15 (16). A mortgagee cannot believe himself to be absolutely entitled to the mortgaged property. And therefore a purchaser from the assignees of the original mortgagee is not a person who can delude himself into such belief, and is therefore not entitled to the benefit of his improvements, although he may have a claim for the cost of repairs as distinct from improvements—*Parashar v. Ganu*, 5 Bom.L.R. 643. Where the properties of a minor were mortgaged by the certificated guardian without obtaining the permission of the District Judge and so the mortgage was voidable at the option of the minor under sec. 30, Guardians and Wards Act, the mortgagee is not, on the mortgage being set aside, entitled to compensation for improvements effected by him, because he could not have believed that he was absolutely entitled to the property. Not even under sec. 63 or 72—*Bechu v. Bhabhuti*, 52 All. 831, A.I.R. 1931 All. 201 (202), 124 I.C. 731. Even sec. 63A will not help him, because it is doubtful whether that section applies to a mortgagee holding under a voidable mortgage. So also, a mortgagor who retains possession of the mortgaged property after the time has expired for payment of the money due on account of the mortgage, is fully acquainted with the imperfection of his title; and on a sale of the property he is not entitled to the emblements raised by him on it—*Land Mortgage Bank v. Vishnu*, 2 Bom. 670.

A mortgagee by conditional sale cannot acquire a title to the property without going through certain formalities. If, without going through those formalities, he assumed on the expiry of the term of his mortgage that he had become the absolute owner of the property, it cannot be said that he believed in good faith that he was absolutely entitled to the property—*Gopi Lal v. Abdul Hamid*, 26 A.L.J. 887, A.I.R. 1928 All. 381 (384), 116 I.C. 91.

But long possession by the occupant may sometimes give rise to the belief that he is absolutely entitled to the property. Thus, equitable relief was given to a person who had been in occupation of the land for a period of 25 years—*Yeshwadabai v. Ramchandra*, 18 Bom. 66 (83). Though under the ordinary law, a mortgagee cannot claim payment for improvements effected without the consent of the mortgagor, yet where the mortgagor did not redeem the mortgage at the end of the term, and the mortgagee (under the mortgage by conditional sale) has for 30 years *bona fide* believed himself to be the proprietor and dealt with the property as such, not knowing that he should take any steps to convert his mortgage by conditional sale into an absolute sale, *held* that the mortgagee is entitled to compensation for improvements—*Ladha Mal v. Jaganath*, 123 P.R. 1888; *Ram Kuar v. Partab Singh*, 58 P.R. 1919, 51 I.C. 689.

It has been pointed out in an Allahabad case that the language of this section is never meant to apply to the case of a mortgagor and mortgagee. A specific rule of law has been enacted in sec. 63 for the purpose of guidance of the Courts where the mortgagor and mortgagee

are concerned. Under that section, when the mortgaged property receives an accession and that accession takes place at the expenses of the mortgagee, certain rights and liabilities follow. Therefore, the question as to compensation to be given at the time of redemption to the mortgagee for improvements effected on the mortgaged property is governed by sec. 63 and not by sec. 51—*Gopi Lal v. Abdul Hamid*, 26 A.L.J. 887, A.I.R. 1928 All. 381 (383). It should be noted that the new section 63A now makes specific provisions for improvements made by a mortgagee, and reference should be made to sec. 63A rather than to sec. 63.

224. Thirdly, he must believe in 'good faith':—An improvement made by a person not believing *bona fide* that he is entitled to make it, does not entitle him to compensation—*Manohari v. Mahammad*, 33 All. 752. To claim compensation for the improvement, honest belief in ownership is necessary—*Kari Goundan v. Raghava*, 1 L.W. 410, 23 I.C. 520. The foundation of a person's right to compensation for improvements lies in the *bona fide* belief that he has a title. If he has not such a *bona fide* belief, he is a mere trespasser. He spends his money at his own risk and can claim no compensation—*Furزند Ali v. Aka Ali*, 3 C.L.R. 195. If a person has made improvements in good faith as a *bona fide* occupant of the land and in the belief that the land is his own, he may be entitled in equity to recover the value of the improvements—*Dharma Das v. Amulya*, 33 Cal. 1119 (1129).

The words "good faith" are defined in the General Clauses Act (1897), sec. 3 (20) as follows: "A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not." This definition does not apply to the Transfer of Property Act, because this Act was enacted prior to the General Clauses Act. In sec. 52 of the Indian Penal Code, good faith has been defined as follows: "Nothing shall be deemed to have been done in good faith which is not done with due care and attention." But if this definition is imported into section 51 of the T. P. Act, it will make the section entirely unworkable. For, if a transferee from a Mitakshara father has taken a transfer with due care and attention, he is not at all liable to be evicted at the instance of the son. Therefore, the words "good faith" should have a meaning which is somewhat between the two definitions quoted above; but it is not possible to lay down a general rule in discussing a particular case—*Lachmi Prosad v. Lachmi Narain*, 25 A.L.J. 926, 107 I.C. 36, A.I.R. 1928 All. 41 (44, 45). The Calcutta High Court holds that a belief in good faith under this section means not only acting honestly and fairly but includes *due inquiry*; so, where a person consciously avoids making an inquiry, though he may be said to have a belief in the matter, it would not be a belief in *good faith*—*Abhoy Churn v. Attarmoni*, 13 C.W.N. 931 (936), 3 I.C. 415. An alienee from a Hindu widow knows that she has only a life interest; consequently he has to make inquiries as to whether the widow had any right to make the transfer, and whether there was any necessity for the transfer; and in the absence of such inquiry he cannot be taken to have believed in good faith that he was absolutely entitled to the property, in order to claim compensation for improvements under this section—*Hans Raj v. Sonni*, 44 All. 665 (667), A.I.R. 1922 All. 194, 20 A.L.J. 524, 67 I.C. 314; *Rajrup v. Gopi*, 47 All. 430, A.I.R. 1925 All. 261, 87 I.C. 44; *Suleman v. Venkataraju*, 21 L.W. 115, A.I.R. 1925 Mad. 670; *Jogeshar v. Jankibai*, A.I.R. 1926 Nag.

384. The defendant purchased certain property from some Hindu females having a limited power of disposition over it, and made certain improvements on the property. In answer to the claim of the reversioners (plaintiffs), the defendant alleged that the alienation was made for legal necessity, but it was found that there was no necessity and that the defendant was fully aware of the family affairs of the females and of the fact that the females could not sell it under certain circumstances, and that he wilfully abstained from making any inquiries on the subject. *Held* that the defendant (even though he purchased for consideration) was not entitled to the cost of improvements, as it could not be said that he believed in good faith that the vendors conveyed a good title in respect of the property—*Nanjappa v. Peruma*, 32 Mad. 530 (531), 4 I.C. 18; *Etizad Husain v. Beni Bahadur*, 5 O.L.J. 1, 45 I.C. 242. But under certain circumstances, the alienee from a Hindu widow may believe himself to be absolutely entitled to the property. Thus, a Hindu widow sold a property in 1906 to G, and in 1910 adopted a son. The adopted son brought a suit in 1912 to challenge an alienation made by the widow, other than the alienation to G. In 1918, G made some improvements on the property. In 1922, the adopted son brought a suit to set aside the sale of 1906. *Held* that since in 1912 the adopted son had brought a suit to set aside another alienation made by the widow, *but had not challenged the sale to G*, and even thereafter for several years had taken no steps to set aside the sale, G must have believed in good faith that he was absolutely entitled to the property purchased by him, when he made the improvements in 1918. He was therefore entitled to the benefit of sec. 51—*Gangadhar v. Rachappa*, 31 Bom.L.R. 453, A.I.R. 1929 Bom. 246 (248), 119 I.C. 182.

But absence of good faith cannot necessarily be inferred from the mere fact of *negligence* in investigating the title, for a purchaser may have notice of facts showing a defect in the title of his vendor, and yet purchase the property honestly believing that he was buying good title. To hold otherwise would be to exclude a very large class of cases from a rule which is obviously based on considerations of justice—*Nanjappa v. Peruma*, 32 Mad. 530 (531). A person who acts honestly can be said to act in good faith, even though he may have been to some extent negligent in inquiring into the seller's authority to sell the property—*Harilal v. Gordhan*, 51 Bom. 1040, A.I.R. 1927 Bom. 611 (613), 105 I.C. 722. Ordinarily, good faith required by this section does not mean anything more than an honest belief in the validity of one's own title—*Moitheensa v. Apsa*, 36 Mad. 194. Even *negligent* belief will amount to honest belief for the purpose of this section. Therefore, though the negligence of the buyer from the guardian of a minor in making due and sufficient inquiries affects his title to immoveable property, still it does not follow that the purchaser did not believe in good faith that he was the full owner when he effected the improvements on the property purchased—*Narayana v. Sankaranarayana*, 1 L.W. 369, 24 I.C. 940; *Harilal v. Gordhan*, 51 Bom. 1040, 29 Bom.L.R. 1414, A.I.R. 1927 Bom. 611 (613), 105 I.C. 722; *Sahabuddin v. Vohidbux*, 56 I.C. 492 (Sind). A person who acts under a *mistake of law* may still act in good faith within the meaning of this section—*Durgozi v. Fakeer Sahib*, 30 Mad. 197 (199); *Sahabuddin v. Vohidbux*, 56 I.C. 492. *Bona fides* is not incompatible with ignorance of law, nor is it incompatible with a certain degree of

negligence. The degree of negligence is a matter to be determined according to the circumstances of each case—*Rama Aiyar v. Narayanasami*, 51 M.L.J. 313, A.I.R. 1926 Mad. 609 (613), 96 I.C. 483.

The question whether the transferee of immovable property does or does not believe in good faith that he is absolutely entitled thereto is a *question of fact* to be inferred from the circumstances of the case—*Durgozi v. Fakeer Sahib*, 30 Mad. 197 (199); *Rama Aiyar v. Narayanasami*, supra. It is always a question of fact whether a transferee believes or not that he is absolutely entitled to the property. It is not in every case of a transfer by a qualified owner, alleging circumstances which would enable him to give absolute title, that the transferee should be treated as believing that he holds absolutely the property in good faith. On the other hand, a man loses his property because of a defect in it, and yet he is supposed to believe in good faith that he is absolute owner of it. It is always a question of fact whether a particular man holds a particular belief—*Lachmi Prasad v. Lachmi Narain*, 25 A.L.J. 926, A.I.R. 1928 All. 41 (44), 107 I.C. 36. Where in case of a sale by the father of a joint family (acting on behalf of himself and as the guardian of his minor son) alleging legal necessity, it was found that the transferee paid full consideration, and the sale was to some extent supported by necessity, *held* that the transferee had sufficient justification for holding the belief in good faith that he was absolutely entitled to the property purchased—*Lachmi Prasad*, supra. The mere fact that a mortgagee by conditional sale has spent money over the property in making improvements ought not to lead the Court to infer that he acted in good faith and believed himself to be absolutely entitled to the property. "If we were to hold that in every case of mortgage by conditional sale, where the mortgagee spends money on improvements, he must be deemed to have acted in good faith and in the belief that he was the absolute owner of the property, we shall be legislating and not arriving at a finding of fact on which the law has to be applied"—*Gopi Lal v. Abdul Hamid*, 26 A.L.J. 887, A.I.R. 1928 All. 381 (385). A person who is *fraudulently* in possession of property cannot be deemed to believe in *good faith* that he is absolutely entitled to the property. Consequently he cannot be allowed any compensation for the sums spent by him in improving the property—*Sadashiv v. Dhakubai*, 5 Bom. 450. Where the title is obviously founded on possession which was originally gained by trespass, it can hardly be said that the person entering upon the land as a trespasser can *bona fide* believe that he is absolutely entitled thereto—*Secretary of State v. Dugappa*, 95 I.C. 789, A.I.R. 1926 Mad. 921. A mortgagee who is not entitled to possession but who somehow or other comes into possession of the mortgaged property and makes improvements thereon, cannot claim the benefit of this section—*Rangayya v. Parthasarathi*, 20 Mad. 120 (124). Where a Hindu widow sold her husband's property at a very low price without any legal necessity, and the purchaser knew of the voidable nature of the transaction, he could not be deemed to have believed in good faith that he was absolutely entitled to the property, and consequently he was not protected by this section—*Muddusami v. Bhaskara Lakshmi*, 29 M.L.J. 357, 30 I.C. 853 (855). But where a person, *bona fide* thinking that he is the heir of a deceased person, spends money in freeing the estate from debts which if he were the real heir he would be bound to pay before he could secure possession, he is en-

titled to recover the amount paid by him from the person who is subsequently found to be entitled to the estate—*Sitla v. Samiuddin*, 4 O.L.J. 514, 42 I.C. 428. A person who purchased a big plot of land was put in possession of a larger area than he purchased. Without knowing of the mistake he made valuable improvements on the excess area, and the vendor took no steps at that time to prevent it. He later sued to eject the vendee from such excess area. *Held* that sec. 51 applied and the vendee was entitled to compensation—*Natesa Thevan v. District Board*, A.I.R. 1926 Mad. 314, 91 I.C. 1. Where the defendant encroached upon the plaintiff's land, believing in good faith that it belonged to him as forming part of his adjoining land, cleared it of jungle and rendered it fit for cultivation at his expense, *held* that the defendant was entitled to compensation for the improvements before he could be ejected by the plaintiff—*Blupendra v. Peari*, 40 I.C. 464. Where the grantee of land under an order of the Tahsildar paid the assessment in respect of the land and spent money in putting the land to good use, without knowing that there had been an appeal from the Tahsildar's order and that on appeal the grant of the land to him had been cancelled, *held* that the grantee effected his improvements in good faith believing that he was absolutely entitled to the land—*Narayanamoorthy v. Secy. of State*, 48 M.L.J. 682, 90 I.C. 555, A.I.R. 1925 Mad. 963. A party to a litigation is not entitled to compensation for improvements made by him *pendente lite* with full knowledge of the risks he runs in doing so—*Velusami v. Bommachi*, 25 M.L.J. 324, 21 I.C. 219. Where the defendant purchased the property with notice of a prior contract of sale between the vendor and the plaintiff, and without making inquiries from the plaintiff, he was not entitled to the value of the improvements effected by him on the property—*Haradhan v. Bhagabati*, 41 Cal. 852 (865).

225. Owner's knowledge—Estoppel:—If it is shown that the real owner knew that the occupants were spending money upon the improvement of the land, and knew also that they were doing so in the belief that they had a good title, and that nevertheless the real owner stood by and allowed the occupants to proceed with their expenditure, he ought not to be entitled to a decree for ejectment without indemnifying them for their outlay—*Nundoo Kumar v. Banomali*, 29 Cal. 871 (884); *Ismail v. Jaigun*, 27 Cal. 570 (584); *Yeshwadabai v. Ramchandra*, 18 Bom. 66 (83). If a stranger begins to build on land supposing it to be his own, and the real owner preceiving his mistake abstains from setting him right and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land—*Ramsden v. Dyson*, (1864) L.R. 1 H.L. 129. "If a man, under a verbal agreement with a landlord for a certain interest in land, or, under an expectation created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation"—*per* Lord Kingsdown in *Ibid*, (at p. 170). Where a person with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, and that other in reliance on such belief alters his position, such person is estopped from repudiating the transaction to the prejudice of that other—*Dharma Das*

v. *Amulya Dhan*, 33 Cal. 1119 (1129) following *Duke of Leeds v. Earl of Amherst*, (1846) 2 Phillips 117. See also *Municipal Corporation of Bombay v. Secy. of State*, 29 Bom. 580 (609, 610). Where the purchaser from a limited owner made improvements on the property and the true owner stood aside and abstained from asserting his rights, an equitable right will arise in favour of the purchaser in respect of those improvements—*Etizad Hussain v. Beni Bahadur*, 5 O.L.J. 1, 45 I.C. 242. Where a mortgagor who has obtained a decree for redemption does not execute it, but allows the property to remain in the hands of the mortgagee for a considerable time, and the latter during the period makes more improvements, *held* that the conduct of the mortgagor amounts to estoppel, and the mortgagee's right to the value of the improvements cannot be denied—*Krishna v. Srinivasa*, 20 Mad. 124 (126).

But if the person making the improvements knows that he is not absolutely entitled to the land, the mere knowledge or silence on the part of the owner will not amount to estoppel. Thus, if a tenant (who knows that he is not absolutely entitled to the land) erects permanent structures upon the land let to him, to the knowledge of and without interference by his lessor, it will not suffice to raise any equitable right in the tenant so as to restrain the landlord from suing in ejectment. The doctrine of estoppel is applicable only where the owner of land seeing his tenant erecting buildings upon it *encourages* or acquiesces in the act, and *purposely* abstains from interference with the view of claiming the building when it is erected—*Beni Ram v. Kundan Lal*, 21 All. 496 (502, 503) (P.C.); *Narasayya v. Rajah of Venkatagiri*, 37 Mad. 1 (13). Where the landlord stood by in silence and the tenant spent a large sum of money in the construction of a building and a well in the premises, but there were special circumstances in the case from which the Court was able to draw the inference that the landlord by his conduct afforded hope and encouragement to the tenant that he would be allowed to remain in peaceful possession or at least would not be ejected without a reasonable return for the expenditure incurred by him, *held* that the landlord had no right to eject the tenant without paying a reasonable compensation for the improvements—*Dattatraya v. Shridhar*, 17 Bom. 736 (741) (explained in 37 Mad. 1 at p. 13). Where the tenant was not ignorant of his own limited rights and spent money in building the premises under no mistaken belief as to such rights, the mere silence on the part of the landlord could not deprive him of his right to take back his property from his tenant with all the improvements imprudently made by the latter. The principle upon which the doctrine of acquiescence is based is that a man who acts in such a way as would make it *fraudulent* for him to set up his legal rights will be deprived of those rights. But where his acquiescence or other conduct does not amount to a fraud, actual or constructive, he cannot be deprived of his legal rights—*Naunihal v. Rameshar*, 16 All. 328.

A fortiori, where the landlord did not even know of the erection of the buildings by the tenant while they were being constructed and did not even become aware of the existence of the buildings after they had been erected, the plea of acquiescence and estoppel must fail—*Ismail v. Jaigun*, 27 Cal. 570 (585).

226. Improvements:—For a definition of “improvement” see section 76 of the Bengal Tenancy Act:—“For the purposes of this Act, the term ‘improvement’ used with reference to a raiyati holding shall mean

any work which adds to the value of the holding, which is suitable to the holding, and consistent with the purpose for which it was let and which, if not executed on the holding, is either executed directly for its benefit or is, after execution, made directly beneficial to it." Then the section goes on to enumerate several kinds of improvements, namely—“(a) the construction of wells, tanks, water-channels, and other works for the storage, supply or distribution of water for the purposes of agriculture, or for the use of men and cattle employed in agriculture; (b) the preparation of land for irrigation; (c) the drainage, reclamation from rivers or other waters, or protection from floods or from erosion or other damage by water, of land used for agricultural purposes, or waste land which is culturable; (d) the reclamation, clearance, enclosure or permanent improvement of land for agricultural purposes; (e) the renewal or reconstruction of any of the foregoing works or alterations therein or additions thereto; and (f) the erection of a suitable dwelling-house for the raiyat and his family together with all necessary out-offices.”

Spending small sums every year for the usual levelling and manure of the lands for the purpose of husbandman-like cultivation thereof is not an improvement within the meaning of this section—*Sudala Muthu v. Sankara Narayana*, 1 L.W. 371, 24 I.C. 879.

Expenditure incurred for the *repair* and up-keep of a house is not expenditure incurred for the purpose of improvements—*Meenatchi v. Manicka*, 1 L.W. 360, 24 I.C. 918 (920). Thus, putting up a staircase in an old house is nothing more than an ordinary repair, and is not an improvement, so as to entitle the alienee to recover the cost of it—*Sidramappa v. Shidappa*, 31 Bom.L.R. 461, A.I.R. 1929 Bom. 230, 119 I.C. 650.

227. Relief of the person making the improvements:—Under the terms of this section, the transferee has a right to require the persons seeking his eviction either to have the present value of the improvements estimated and paid or secured to him or to sell their interest in the property to him at the market value irrespective of the value of such improvements. The *option to decide* which of these two courses they will adopt rests with the *persons seeking the eviction*—*Ramanathan v. Ranganathan*, 40 Mad. 1134 (1144, 1160); *Rama Aiyar v. Narayanasami*, 51 M.L.J. 313, 96 I.C. 483, A.I.R. 1926 Mad. 609 (614); *Narayana v. Ganesh*, 28 Bom. L.R. 993, A.I.R. 1926 Bom. 599, 97 I.C. 700; *Moti Chand v. British India Corporation*, 1932 A.L.J. 54, A.I.R. 1932 All. 210, 136 I.C. 78; *Coller v. Baron*, 2 N.L.R. 34. Where it is found that the owner's circumstances are too poor to permit him to pay for the value of the improvements, the Court is justified in requiring him to sell his interest in the property to the transferee, without giving him the option of recovering the property by payment of the value of the improvements—*Lachmi Prasad v. Lachmi Narain*, 25 A.L.J. 926, A.I.R. 1928 All. 41 (45), 107 I.C. 36.

In some cases, the transferee has not been allowed the cost of his improvements, but has been allowed merely to *remove the materials* of the building he has erected. Thus, in a Madras case, where a permanent lease was granted by the trustee of a religious trust, the lease was held to be invalid, and the lessee who had built a house on the leased land was not entitled to any compensation before his eviction, but was merely allowed to remove the materials of his house—*Venkatappier v. Ramaswami*, 1919 M.W.N. 548, 52 I.C. 517 (519). A Hindu widow mortgaged

a property with possession, without any legal necessity, and the mortgagee proceeded to build a house on the land. The mortgagor died, and her co-widow, on whom the land devolved by survivorship, sued for possession. *Held* that the mortgagee was not entitled to claim the cost of the improvements (see Note 244), but he was allowed to remove the materials of the house—*Hans Raj v. Somni*, 44 All. 665 (668). This case has been criticised by the Rangoon High Court on the ground that if a person, who has not been allowed to claim the benefit of sec. 51, is nevertheless permitted to remove the materials of the house built by him, it would make the provisions of sec. 51 nugatory, for he will practically get the benefit which he has been declared not to be entitled to—*Maung Aung v. Ma Nyun*, A.I.R. 1928 Rang. 141 (142), 117 I.C. 56. But this is not so, for the materials of the house are worth much less than the house itself, and all the expenses of building the house are lost to him.

The person making the improvements has no lien on the land for the value of the improvements. Even if it is assumed that he has a lien on the land, still he is not entitled to remain on the land until he is reimbursed; and the owner of the land is entitled to a decree for ejectment—*Dharma Das v. Amulya Dhon*, 33 Cal. 1119 (1130).

228. Compensation for improvements:—A party is entitled to compensation for improvements in proportion to the extent to which the estate has been permanently increased—*Kunhi v. Kunkan*, 19 Mad. 384. Compensation can be claimed only for such improvements as are in the land in a reasonably good condition—*Gubbins v. Creed*, 2 Sch. & Lef. 225; *Krishna v. Srinivasa*, 20 Mad. 124 (128).

Who can claim compensation:—The value of improvements can be claimed under this section by the transferee who makes the improvements or by his heir. But if the improvements are made by the *transferor*, the transferee or his heir cannot claim compensation as against a person who seeks to recover the property as a reversioner of the transferor—*Meenatchi v. Manicka*, 1 L.W. 360, 24 I.C. 918 (920).

Where trees were planted on the land by the donees, the collaterals of the donees are not entitled to claim compensation—*Harnaman v. Dasandhi*, 1 Lah. 210, 56 I.C. 733, 112 P.L.R. 1920.

229. Value of improvements:—In estimating the value of improvements a good deal must necessarily be left to conjecture. In all valuations, judicial or otherwise, there must be room for inferences and inclinations of opinion which being more or less conjectural are difficult to reduce to exact reasoning or to explain to others. In such cases, there is more than ordinary room for guess-work; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at—*Secretary of State v. Charlesworth*, 26 Bom. 1 (21) (P.C.). In awarding compensation, the Court has to consider how far the property has been improved in market value, and not merely consider the amount expended—*Gangadhar v. Rachappa*, 31 Bom.L.R. 453, A.I.R. 1929 Bom. 246 (249), 119 I.C. 182; *Sardar Mahomed Tahir v. Mian Pirbux*, 25 S.L.R. 433, 139 I.C. 388, A.I.R. 1932 Sind 42 (46).

In the case of trees, the improvement for which compensation is payable is not the capitalized value of the produce of trees for the period of the life of those trees, but the work of planting, protecting and main-

taining the trees—*Kunhi v. Kunkan*, 19 Mad. 384; *Shangunni v. Veerappa*, 18 Mad. 407.

Under this section, the compensation should be estimated with reference to the market value at the time of eviction. In a decree for redemption, however, the final adjustment of the amount of compensation must be made with reference to the state of things at the time of actual redemption—*Krishna v. Srinivasa*, 20 Mad. 124 (126). Even after a redemption-decree has been passed, the mortgagee can in execution-proceedings claim a revaluation if he can show that since the passing of the decree the value of the improvements has increased—*Ramunni v. Shanku*, 10 Mad. 367. So also, the mortgagor would be entitled to obtain a reduction of the amount mentioned in the decree, if he can prove that any part of the improvements assessed therein has, since the passing of the decree, ceased to exist—*Krishna v. Srinivasa*, 20 Mad. 124 (126).

230. Para 3:—Growing crops:—Where the mortgagor has deposited in Court the whole money due on his mortgage, the decree should not be subjected to the condition that the defendant (usufructuary mortgagee) is not to be evicted till the crops he had sown are cut; but he is entitled to the crops sown by him and to free ingress and egress to gather and carry them—*Deo Dat v. Ram Autar*, 8 All. 502.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose.

52. During the *pendency* in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of *any* * * suit or proceeding *which is not collusive and* in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presenta-

tion of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

Amendment:—The following amendments have been made by sec. 14 of the Transfer of Property Amendment Act (XX of 1929):—

(a) For the words “active prosecution” the word “pendency” has been substituted; see Note 231.

(b) For the words “a contentious suit or proceeding” the words “any suit or proceeding which is not collusive” have been substituted; see Note 242.

(c) The Explanation has been added; see Notes 237 and 238.

231. The reasons have been thus stated by the *Special Committee* (1927):—

“Section 52 deals with the doctrine of *lis pendens*. It begins with the words ‘during the active prosecution.....of a contentious suit or proceeding’; the marginal note is ‘Transfer of property *pending* suit relating thereto.’ As to the words ‘active prosecution,’ it has been held that there could hardly be said to be active prosecution if after filing the plaint the plaintiff has taken no steps to effect service of summons, or if after a decree dismissing his suit he takes no steps to file an appeal (18 Cal. 188, 195; 28 Cal. 23, 26). In Bombay the decisions are not quite consistent. The view generally held is that if no steps are taken to execute the decree and the property comprised in the decree is transferred four years after the decree, as in 37 Bom. 621, or seven years after the date of the decree as in 12 Bom. 217, the transfer could not be said to have been made *pendente lite*. In the latter case the Court went so far as to hold that the *lis pendens* ended with the decree. This view was accepted in 22 Bom. 939, but it was held that that rule did not apply to administration suits and suits for an account and to suits of a similar nature in which the decree is the inception of subsequent proceedings. 22 Bom. 939 was a mortgage suit, and the transfer in that case was made after the decree for sale and before the date of sale. It was held, following 21 W.R. 349, which was approved by the Judicial Committee in L.R. 15 I.A. 97, 15 Cal. 756, that the transfer was *pendente lite*.

“As to the word ‘contentious’ it was held in some cases that a suit became contentious only from the date on which summons was served on the defendant (15 Cal. 647; 27 Cal. 77; 21 All. 408), and in some cases that it became contentious when the defence was put in (31 Cal.

658, which was a partition suit). But these decisions are not good law since the ruling of the Judicial Committee in *Faiyaz Husain Khan v. Prag Narain*, (1907) 34 I.A. 102, 29 All. 339, where it was held that according to the true construction of this section there was no warrant for the view that a suit, contentious in its origin and nature, is not so within the meaning of the section until after summons is served on the opposite party.

"In view of the difficulties created by the use of the words 'active prosecution' and 'contentious', it is proposed to substitute the word 'pendency' for the words 'active prosecution', and to omit the word 'contentious', and to add an Explanation to make it clear when the pendency of a suit or proceeding shall be deemed to commence and when it shall be deemed to end.

"We also propose to insert in the section the words 'which is not collusive', for a collusive suit is not a real suit at all, but merely a pretence (6 Bom. 703; 11 Bom. 708). Further, to attract the doctrine of *lis pendens* the suit must be pending in a Court of competent jurisdiction, and this has been made clear in the Explanation.

"We have not thought it proper to include in the Explanation cases where an order is passed against an intervenor in execution proceedings, as the proper remedy in such cases is a suit under Order 21, rule 63 of the Code of Civil Procedure, 1908. We have also excluded cases of review.

"It has been suggested that to avoid the difficulties that may arise by the application of the doctrine of *lis pendens*, the system of registration of suits prevailing in England should be adopted in this country at least in the Presidency Towns. This is really a question of administration and is beyond the scope of our reference."

232. Principle of section:—The principle of this section will be found in the judgment of Lord Justice Turner in the leading case of *Bellamy v. Sabine*, 1 DeG. & J. 566: "The doctrine of *lis pendens* is not founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is a doctrine common to the Courts both of law and of equity, and rests, as I apprehended, upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo* subject again to be defeated by the same course of proceedings." In the same case, Lord Cranworth observes: "Where a litigation is pending between a plaintiff and a defendant as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigating parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence." The doctrine is intended to prevent one party to a suit making an assignment inconsistent with the rights which may be established in the suit and which might require a further party to be impleaded in order to make effectual

the Court's decree—*Tiloke Chand v. Beattie & Co.*, 29 C.W.N. 953, A.I.R. 1926 Cal. 204 (211), 94 I.C. 538.

"Every man is presumed to be attentive to what passes in the Courts of Justice of the State or Sovereignty where he resides. Therefore, a purchase made of property actually in litigation, *pendente lite*, for valuable consideration and without express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit. Ordinarily it is true that the judgment of a Court binds only the parties and their privies in the representation or estate. But he who purchases during the pendency of an action is held bound by the judgment that may be made against the person from whom he derives title. Otherwise alienations made during an action might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim *pendente lite nihil innovatur* (during a litigation nothing new should be introduced) the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation."—*Story's Equity Jurisprudence*, sections 405, 406.

233. Application of section to execution and revenue sales:—

Reading the plain language of this section with that of section 2 (d) it is quite clear that the Legislature did not intend that any sale in execution of a decree or order of a Court of competent jurisdiction should be affected by the provisions of this section. But still it is now settled law that the doctrine of *lis pendens* as laid down in this section (though not the section itself) applies as well to *involuntary* as to *voluntary* transfers; and therefore a purchaser of a property at an execution sale during the pendency of a suit in respect of the same property is affected by the doctrine of *lis pendens*. See *Parvati v. Kishan Singh*, 6 Bom. 567; *Byramji v. Chunilal*, 27 Bom. 266; *Bhaskar v. Shankar*, 26 Bom. L.R. 418, 80 I.C. 453, A.I.R. 1924 Bom. 467; *Sukhdeo v. Jamna*, 23 All. 60; *Jharoo v. Raj Chunder*, 12 Cal. 299; *Nilakant v. Suresh Chandra*, 12 Cal. 414 (P.C.); *Gobind Chunder v. Guru Churn*, 15 Cal. 94; *Mati Lal v. Preo Lall*, 13 C.W.N. 226 (233); *Motilal v. Karrabuldin*, 25 Cal. 179 (P.C.); *Maharaj Bahadur v. Surendra Narain*, 19 C.W.N. 152; *Harshankar v. Sheo Gobind*, 26 Cal. 966; *Deno Nath v. Shama Bibi*, 28 Cal. 23; *Kunhi v. Ahmed*, 14 Mad. 491; *Vythnadayyan v. Subramanya*, 12 Mad. 439; *Krishnaya v. Mallaya*, 41 Mad. 458 (462); *Vedachari v. Narasimha*, 45 M.L.J. 825, A.I.R. 1924 Mad. 307; *Pethu Ayar v. Sankarabayana*, 40 Mad. 955; *Venkatrama v. Rangiah*, 46 M.L.J. 258, A.I.R. 1924 Mad. 449; *Thammayya v. Ramanna*, 51 M.L.J. 475, A.I.R. 1926 Mad. 1161; *Tinoodhan v. Tirulokya*, 17 C.W.N. 413, 18 I.C. 177; *Ramdulari v. Upendra*, 4 Pat. 619; *Mathura Prosad v. Dasai*, 1 Pat. 287, 65 I.C. 325; *K. Y. Chettiar Firm v. Jamila*, 7 Rang. 734, A.I.R. 1930 Rang. 132 (135), 121 I.C. 792; *Sohan Lal v. Jotsingh*, 16 O.C. 148, 20 I.C. 458; *Kunja Behari v. Ram Sahai*, 2 O.L.J. 327, 30 I.C. 213; *Satgur v. Nund Kumar*, 4 O.L.J. 135, 40 I.C. 146; *Qudratulla v. Gulgandi*, A.I.R. 1925 Oudh 496, 29 O.C. 37, 89 I.C. 570; *Abid Hussain v. Munno Bibi*, 2 Luck. 496, A.I.R. 1927 Oudh 261 (263), 102 I.C. 72.

Thus, the auction-purchaser of a share of an estate sold for arrears of revenue under sec. 13 of the Bengal Revenue Sale Act (XI of 1859) may be affected by the doctrine of *lis pendens* if he makes the purchase during the pendency of a litigation to enforce a mortgage upon that pro-

erty—*Bhawani Koer v. Mathura Prosad*, 7 C.L.J. 1. The principle of *lis pendens* applies to a case where a person purchases a share of an estate sold for arrears of revenue, at a time when execution proceedings in a suit to enforce an existing mortgage on the property are pending. In such a case, the purchaser at revenue sale will be deemed to have purchased the mortgagor's equity of redemption, and if he fails to redeem the mortgage before the mortgage-sale is confirmed, his right to redemption of the property as well as title to the property is lost—*Har Shankar v. Sheo Gobind*, 26 Cal. 966; *Mahomed Tayeb v. Hem Chandra*, 10 C.L.J. 590, 4 I.C. 734; *Prem Chand v. Purnima*, 15 Cal. 546; *Mathura v. Dasai*, 1 Pat. 287. Pending a suit for specific performance of a contract for sale of immoveable property, the property cannot be sold in execution so as to defeat the plaintiff's claim—*Bhaskar v. Shankar*, 26 Bom.L.R. 418, 80 I.C. 453, A.I.R. 1924 Bom. 467. During the pendency of a mortgagee's suit for sale of the mortgaged property, a third person obtained a money decree against the mortgagor and had the mortgaged property sold. *Held* that in the absence of fraud, the sale in execution under the money decree was a sale *pendente lite* as regards the mortgage-suit, and as the auction-purchaser bought only the equity of redemption, his title to the land would be subject to the rights of the mortgagee—*Abdul Majid v. Abdul Majid*, 4 Bur.L.T. 44, 9 I.C. 772; *Tinoodhan v. Tirulokya*, 17 C.W.N. 413, 18 I.C. 177; *Chaman Lal v. Kamaruddin*, A.I.R. 1922 Pat. 655, 3 P.L.T. 757, 67 I.C. 262; *Qudratulla v. Gulgandi*, 29 O.C. 37, 89 I.C. 570, 12 O.L.J. 346, A.I.R. 1925 Oudh 496. Where the first mortgagee obtained a decree for sale on the foot of his mortgage without impleading the second mortgagee, and after the decree but before the sale the second mortgagee sued and obtained a decree for sale and then brought the property to sale, *held* that the sale under the first mortgagee's decree being pending the second mortgagee's suit, the rights of the purchaser under that sale are subject to the rights obtained under the second mortgagee's decree and sale thereunder—*Venkatasubbarayudu v. Naganma*, 59 M.L.J. 39, 31 L.W. 520, A.I.R. 1930 Mad. 570 (572), 127 I.C. 228. So also, where the property was sold for arrears of income-tax under the Madras Revenue Recovery Act during the pendency of execution proceedings on a mortgagee-decree passed in respect of the same property, *held* that the doctrine of *lis pendens* applied, and the purchaser at the revenue sale acquired only the equity of redemption in respect of the defaulter's share in the mortgaged property. If therefore he did not take steps to prevent the subsequent sale held under the mortgage-decree, his right to redeem the property was extinguished—*Kadir Mohideen v. Muthu Krishna*, 26 Mad. 230. K brought a suit against P to recover possession of land. Whilst this suit was pending, the right, title and interest of P in the land were sold in execution of a decree against him at the instance of a judgment-creditor, and purchased by G. K's suit for possession was decreed, and G instituted a suit against K to eject him and obtain possession of the land. *Held* that the doctrine of *lis pendens* applied, and G was not entitled to recover the land—*Gobind Chunder v. Guru Churn*, 15 Cal. 94 (99).

The doctrine of *lis pendens* applies also to a sale held by order of a Magistrate under sec. 88 Cr. P. Code. So, where during the pendency of a suit in a Civil Court, the suit-property was attached and sold by the Magistrate under sec. 88 Cr. P. Code, and subsequently the Civil Court

decreed the suit, *held* that the decreeholder could recover the property from the purchaser in the criminal proceeding—*Narayan v. Gobind*, 31 Bom.L.R. 345, A.I.R. 1929 Bom. 200 (201), 116 I.C. 271.

234. Sale by mortgagee under power:—This section does not apply to a suit for redemption brought by the mortgagor who has given to the mortgagee under the mortgage an express power of sale. Therefore, a private sale of the mortgaged property by the mortgagee in exercise of such power is not affected by the doctrine of *lis pendens*, and is valid though made during the pendency of a redemption suit filed by the mortgagor—*Ramkrishna v. Official Assignee*, 45 Mad. 774 (776), 43 M.L.J. 566, A.I.R. 1922 Mad. 390, 69 I.C. 407.

235. Pre-emption suits:—The doctrine of *lis pendens* applies to a suit for pre-emption; and the vendee cannot defeat the pre-emptor's right by transferring the property, pending the suit for pre-emption—*Ram Shankar v. Nanik Prosad*, 17 O.C. 150, 24 I.C. 32; *Bhagwan v. Nanak Chand*, 49 All. 516, A.I.R. 1927 All. 336 (337), 25 A.L.J. 479; *Ghasitey v. Govind*, 30 All. 467 (469); *Bhagirathi v. Rajkishore*, 1930 A.L.J. 766, A.I.R. 1930 All. 354 (355), 122 I.C. 887; *Kubra Bibi v. Khudaija*, 20 O.C. 13, 38 I.C. 582 (584).

Where pending a suit for pre-emption the vendee sold the property to one having an *equal right* to pre-empt as the plaintiff, the right of the plaintiff was not affected by the sale—*Ghasitey v. Govind*, *supra*. But in a later Allahabad case, it has been held that in such a case, the proper procedure is to divide the property among the plaintiff (pre-emptor) and the vendee's vendee—*Bachan Singh v. Bijai*, 48 All. 221, 24 A.L.J. 130, A.I.R. 1926 All. 180 (181), 90 I.C. 238. In this case, some of the pre-emptors dropped out in the course of the suit. The Lahore High Court, however, is of opinion that the doctrine of *lis pendens* *does not affect* the validity of a sale effected by the vendee during the pendency of a pre-emption suit to a person possessing a right of pre-emption equal to that of the pre-emptor; nor can the property be divided equally between the pre-emptor and the vendee's vendee—*Mool Chand v. Ganga*, 11 Lah. 258 (F.B.), 31 P.L.R. 342, A.I.R. 1930 Lah. 356 (357).

If, pending the suit for pre-emption the vendee sells the property to a person having right of pre-emption *superior* to that of the plaintiff, the doctrine of *lis pendens* will not apply, and the purchaser having a preferential right of pre-emption is entitled to retain the property purchased by him—*Malik Singh v. Shiam Lal*, 1929 A.L.J. 537, A.I.R. 1929 All. 440 (442), 118 I.C. 43; *Bhag v. Ujagar*, 32 P.L.R. 283, A.I.R. 1931 Lah. 435. If, however, at the time of the original sale by the vendor to the vendee, the person having a preferential right of pre-emption did not come forward to assert his right within the period of limitation, and then after a suit for pre-emption was brought by another person, the vendee sold the property to the person having the preferential right, *held* that the superior pre-emptor, having *waived* and lost his right, was not entitled to retain the property as against the inferior pre-emptor (plaintiff)—*Asa Singh v. Naubat*, 19 A.L.J. 143, 61 I.C. 34; *Rama Shankar v. Nanik*, *supra*; *Kamta Prasad v. Ram Jag*, 36 All. 60 (62); *Kubra Bibi v. Khudaija*, *supra*.

Even the resale of the property by the vendee to the *vendor* after the institution of the suit for pre-emption cannot defeat the plaintiff's right of pre-emption—*Kedar Nath v. Bankey Behary*, 11 I.C. 645 (646) (All.);

Raijai v. Irbhan, 3 I.C. 923, 5 N.L.R. 136; *Bhikki Mal v. Debi Sahai*, 47 All. 923, A.I.R. 1926 All. 179 (180), 23 A.L.J. 615, 89 I.C. 219; *Durga Prosad v. Gangadin*, 88 I.C. 202, A.I.R. 1925 All. 502; *Kahar Singh v. Jahangir*, 47 All. 625, A.I.R. 1925 All. 487 (488), 88 I.C. 761.

235A. Contribution suits:—Where on a mortgage-decree against two properties jointly mortgaged, one was sold, the sale proceeds of which sufficed to satisfy the whole debt, and a person who had acquired before the sale a share in that property in execution of a simple money-decree against the mortgagor, sued for contribution from the other property and ultimately obtained a decree in his favour, and where that other property was sold away to another during the pendency of the contribution suit, *held* that the doctrine of *lis pendens* applied, and that the purchaser could take that other property only subject to the right of contribution decreed against it—*Baldeo Sahai v. Baij Nath*, 13 All. 371.

Essentials of this section:—

- (i) There must be pendency of a suit or proceeding.
- (ii) The litigation must be pending in a competent Court.
- (iii) The suit or proceeding must not be collusive.
- (iv) A right to immoveable property must be in dispute.
- (v) A right to immoveable property must be directly and specifically in question.
- (vi) The property in dispute must be transferred or otherwise dealt with by any party to the litigation.
- (vii) The alienation must affect the rights of the other party.

236. "Pendency":—The words "active prosecution" have been substituted by the word "pendency"; consequently, the cases which turned upon the construction of the former expression are no longer of any importance.

237. When "pendency" of suit begins:—Under the Explanation newly added, the pendency of a suit or proceeding begins from the presentation of the plaint or the institution of the proceedings.

But if a plaint is presented with insufficient Court-fee, and is returned by the Court, and then the plaintiff re-presents it after paying the proper Court fee, and then the plaint is registered as admitted *on the later date*, it is this later date which must be taken as the date of institution of the suit. A transfer of property made between the date of original presentation and this later date is not affected by *lis pendens* as no suit was pending at that time—*Mohendra v. Parameshwar*, 60 I.C. 439 (440). In case of a pauper suit, the active prosecution (*i.e.*, the pendency of the suit) is deemed to commence as soon as the application for leave to *sue in forma pauperis* is made to the Court. Therefore, where after such an application was made by the plaintiff, but before it was granted, the defendant mortgaged part of the property in dispute, and the plaintiff's suit was subsequently, after contest, decreed, *held* that this section applied, and the mortgage could not be enforced against the plaintiff—*Ambika Partap v. Dwarka Parshad*, 30 All. 95 (102).

The presentation in Court of an award obtained by the plaintiff empowering him to sell certain property mortgaged to him in satisfaction of his debt was held equivalent to the presentation of a plaint for the specific performance of the contract of mortgage; the proceedings consequent thereon constituted a *lis pendens* during which a mere money-decree-

holder could not, by bringing the property to sale, defeat the object of the plaintiff's application to the Court—*Pranjiban v. Bajju*, 4 Bom. 34.

Under the old section, the doctrine of *lis pendens* did not apply unless the suit was “contentious,” and the Courts had to consider from what point of time the suit became contentious. The present section has omitted that ambiguous word, and therefore the decisions bearing on the construction of the word “contentious” need not be considered. It was held in some earlier cases that a suit became contentious only from the date when the summons was served on the defendant, and therefore *lis pendens* did not begin until such summons was served. See *Radhashyam v. Shibu*, 15 Cal. 647; *Parsotam v. Sanchilal*, 21 All. 408; *Abhoy v. Annamalai*, 12 Mad. 180; *Krishna Kamini v. Dinamani*, 31 Cal. 658. But the Privy Council overruled these decisions remarking that it would be dangerous to hold that *lis pendens* did not begin until the summons was served on the opposite party, especially in a country where evasion of service is not a matter of any difficulty. The doctrine of *lis pendens* would apply even where the transfer took place before service of summons—*Faiyaz Husain v. Prag Narain*, 29 All. 339, 345 (P.C.); *Krishnappa v. Shivappa*, 31 Bom. 393; *Jogendra v. Fulkumari*, 27 Cal. 77 (83); *Ghasitey v. Gobind*, 30 All. 467 (468). This section becomes operative from the very moment of the institution of a *bona fide* suit which is not in any way collusive—*Shafiqullah v. Samiullah*, 52 All. 139, A.I.R. 1929 All. 943 (945). The *Explanation* now lays down in express terms that the *lis* commences from the presentation of the plaint.

238. How long does “pendency” of suit continue:—The “active prosecution” (*i.e.*, pendency of the suit) is deemed to continue even during the proceedings in *execution*, since these proceedings are merely a continuation of those in the suit. Therefore, this section applies to transfers made during the pendency of execution proceedings—*Shivjiram v. Waman*, 22 Bom. 939; *Thakur Prasad v. Gaya*, 20 All. 349; *Har Shankar v. Shew Govind*, 26 Cal. 966; *Abid Hussain v. Munno Bibi*, 2 Luck. 496, 102 I.C. 72, A.I.R. 1927 Oudh 261 (263); *Wazir Husain v. Beni Madho*, 7 O.W. N. 676, A.I.R. 1930 Oudh 362. This is now made clear by the *Explanation* which lays down that the pendency of a suit continues until *complete satisfaction* of the decree has been obtained. The ruling in *Bhoje Mahadev v. Gangabai*, 37 Bom. 621, that the *lis* ends with the decree is no longer correct.

The doctrine of *lis pendens* applies to a transfer made during the pendency of an appeal—*Radhika v. Radhamoni*, 7 Mad. 96 (98).

So also, the doctrine of *lis pendens* applies to an assignment made after the passing of the decree and before the filing of the appeal—*Govindappa v. Hanumanthappa*, 38 Mad. 36 (39). In such a case, the suit is regarded as pending till the decision of the Appellate Court. The decree of the Appellate Court is the “final decree” in the case, and the proceedings in the Appellate Court must be treated as a continuation of the proceedings in the original Court. It is not open to a defeated suitor to file an appeal immediately, as he has to obtain copies of decree and judgment, and he ought not to suffer for the delay imposed by law. There is no reason why this delay should prejudice him in this respect any more than the delays due to adjournment or stay of proceedings—*Settappa v. Muthia Goundan*, 31 Mad. 268 (270); *Dino Nath v. Shama Bibi*, 28 Cal. 23 (26, 27), 4 C.W.N. 740.

In the case of a mortgage-suit, a decree under O. 34, r. 4, C. P. Code, is, on the face of it, not a final decree but a decree *nisi*. The suit does not terminate with the decree *nisi* but continues till the making of the order absolute (final decree) for sale. So, a purchase is to be considered *pendente lite*, if it is made between the date of a decree *nisi* and the passing of an order absolute (final decree) for sale—*Parsotam v. Chhedda*, 29 All. 76 (80); *Chunnilal v. Abdul Ali*, 23 All. 331 (334); *Dhiraj v. Dinanath*, 6 N.L.R. 140, 8 I.C. 288 (290); *Lachiram v. Bholu*, 82 I.C. 452, A.I.R. 1925 Nag. 132 (134). It has been further held that in a suit for sale on a mortgage, the proceedings for the purpose of *lis pendens* must be taken to continue till the property is actually sold—*Ramasami v. Govinda*, 31 M.L.J. 839, 38 I.C. 1 (4); *Unreported Calcutta Case* (referred to in 23 All. 331 at p. 335). The doctrine of *lis pendens* is applicable during proceedings to realise the mortgage-money after the decree for sale or after the sale—*Bhawani v. Mathura*, 7 C.L.J. 1; *Braja Nath v. Joggeswar*, 9 C.L.J. 346, 1 I.C. 62; *Surjiram v. Barhamdeo*, 2 C.L.J. 288; *Mahomed Tayab v. Hem Chandra*, 10 C.L.J. 590, 4 I.C. 731; *Ghanshyam Das v. Ragho*, 10 Pat. 234, A.I.R. 1931 Pat. 64 (67). The *lis pendens* continues till the final decree is made and the mortgagee or auction purchaser, as the case may be, is placed in possession—*Sami Nath v. Thakur Prasad*, A.I.R. 1927 All. 309 (310). But the doctrine of *lis pendens* does not apply to a proceeding under O. 34, r. 6, because it is not a proceeding in which any right to immoveable property is directly or specifically in question, the decree passed in such proceeding being a mere money-decree—*Badri Singh v. Hazari Singh*, 7 O.W.N. 123, A.I.R. 1930 Oudh 93 (95). In a suit for foreclosure, the *lis* does not terminate with the passing of the preliminary decree under O. 34, r. 2, which is only a decree *nisi* and does not end the litigation; and therefore a transfer of the mortgaged property, made after the passing of the preliminary decree but before it is made final or before an application is made for the final decree, is subject to the doctrine of *lis pendens*—*Parsotam v. Chheddalal*, 29 All. 76 (80); *Premasukh Das v. Peerkhan*, 23 N.L.R. 86, A.I.R. 1926 Nag. 21 (22); *Ram Charan v. Parmeshwar*, 55 All. 235, A.I.R. 1933 All. 201 (202). In America it has been held that a suit for foreclosure, for the purposes of *lis pendens*, continues until the mortgagee is actually placed in possession under his foreclosure. "Although it is true as a general rule, that *lis pendens* ceases with the rendition of judgment or entry of final decree, yet in the foreclosure of a mortgage on real estate, it cannot be said that *lis pendens* ceases upon the making of the Master's deed after sale under the decree. Where something remains to be done by the Court in the execution of its judgment and decree other than can be done without order of Court by the merely ministerial officers of the Court, *lis pendens* continues until this decree is executed. So, in the case of the foreclosure of a mortgage, it continues until the mortgagee has been put into possession of the property." Bennett on *Lis Pendens*, p. 120; *Hukum Chand's Res Judicata*, p. 697. "In a foreclosure suit in equity, the Court is not *functus officio* until the decree is executed by the delivery of possession, and the *lis pendens* does not cease until that is done."—Van Fleet's *Former Adjudication*, Vol. II, p. 1098, cited in 29 All. 76 (80). The law is now clearly stated in the Explanation which lays down that the pendency of a suit continues until the suit has been disposed of by a final decree or order and complete satisfaction of the decree or order has been obtained. See *Moti Chand v. B. I. Corporation*, 1932 A.L.J. 54, A.I.R. 1932 All. 210.

Similarly, in a suit for account, *lis pendens* does not terminate with the passing of the decree for account, for the decree does not practically put an end to the suit—*Gocool v. Administrator-General*, 5 Cal. 726.

Negligence in executing decree:—It was held under the old section that the party relying upon the rule in this section must not be guilty of laches or negligence, and that one element of ‘active prosecution’ of a suit was that there must be no negligent intermission in its continuance. Therefore, where nothing was done in a suit after the decree during the 7 years which elapsed between the date of the decree and the date of the transfer, *held* that the suit in which the decree was passed could not affect the title of the purchaser as a *lis pendens*, and the transferee took the property unaffected by the decree-holder’s equitable lien created by the decree—*Venkatesh v. Maruti*, 12 Bom. 217. In another case also, where within four years after the passing of the decree no execution proceedings were taken, and the judgment-debtor thereafter sold a portion of the property, it was held that it could not be said that the purchase was made during the active prosecution of a suit or proceeding—*Bhoje Mahadev v. Gangabai*, 37 Bom. 621, 21 I.C. 54. So also, where there was a delay of two years in executing a decree for specific performance, it was held that there was no active prosecution on the part of the decreeholder—*Haralal v. Lala Prasad*, A.I.R. 1931 Nag. 138 (140), 133 I.C. 395; *Lakshman v. Rama Chandra*, 34 Bom.L.R. 117, A.I.R. 1932 Bom. 301. Under the present section, by reason of the omission of the words “active prosecution” the question of negligence has become immaterial; and the Explanation extends the time of *lis pendens* up to the date of satisfaction of the decree. But the principle of the above cases would apply, and if there is an inordinate delay on the part of the decree-holder in executing his decree, the Court may refuse to say that the *lis* continues up to the execution of the decree.

Transfer during claim suit:—A suit under O. XXI, r. 63 being only a continuation of the claim proceedings, an alienation of property made during the continuation of the proceedings originated by the claim petition till the disposal of the claim suit, must be deemed an alienation *pendente lite*, and the alienee takes his alienation subject to the result of the claim suit or appeal—*Krishnappa Chetty v. Abdul Khader*, 38 Mad. 535 (541), 26 M.L.J. 449, 25 I.C. 1; *Khairulla v. Sett Dhanrupmal*, A.I.R. 1925 Nag. 82, 80 I.C. 905.

“Or discharge”:—The Explanation says that the pendency of a suit continues until satisfaction or discharge of the decree has been obtained. The words “or discharge” provide for the case of discharge of a decree by the relinquishment by the decree-holder of his decretal rights—*Report of the Select Committee* (1929).

When “pendency of suit” ends:—When a suit is decreed, and a sale takes place in execution of the decree, the *lis* ends there, and does not continue up to the date of *confirmation* of sale, because the confirmation relates back to the date of sale. Therefore, where a female brought a suit for maintenance subsequent to the sale, and pending the suit, the sale was confirmed, *held* that the sale was not *pendente lite* and the purchaser took the property free from any charge of maintenance—*Lanka Gopalam v. Lanka Ratnamma*, 28 M.L.J. 666, 26 I.C. 353 (355).

239. Revival of suit:—Where a suit dismissed for default is revived within a reasonable time, there is no suspension of *lis pendens*.

By the immediate application for re-trial, the plaintiff will be considered constant and continuous in his prosecution—*Bishop of Winchester v. Paine*, (1805) 11 Ves. 194 (200, 201). The restoration of a suit relates back to the date of the application for restoration. Thus, a suit was dismissed for default on 23rd April, 1907 and an application for restoration was made on the 24th April. On the 25th April defendant sold away a part of the property in dispute; the application for restoration was granted on 4th March, 1908. *Held* that the restoration must be deemed to have related back to the date of the application for restoration on the 24th April, so that the sale on the 25th April was affected by the rule of *lis pendens*—*Asutosh v. Ananta Ram*, 50 I.C. 727 (Cal.).

But the doctrine has no application in a case, where on the dismissal of the first suit, the plaintiff is compelled to bring a *fresh* suit; and therefore, a transfer made between the date of dismissal and that of the institution of a new suit will not be affected by the rule of *lis pendens*—*Hukum Chand on Res Judicata*, pp. 698, 699.

240. Review:—Proceedings on a review are not regarded as a continuance of the original suit, the judgment wherein it is sought to reverse. An application for review is a new and original proceeding which, to affect a stranger as a *lis pendens*, cannot be regarded pending before service of notice. Prior to the commencement of proceedings on a review and the serving of notice, if the decree-holder in the original suit transferred the property decreed to him, the purchaser would be unaffected by the doctrine of *lis pendens*—*Hukum Chand on Res Judicata*, pp. 701, 702. “It is clear that when a sale of land is made between the date of final judgment affecting the land and the date when the proceeding in error is commenced to reverse that judgment, it is not subject to a *lis pendens*, and the purchaser will get a good title by the purchase notwithstanding the circumstance that the judgment is afterwards reversed in the proceedings under the writ of error”—*Pierce v. Stinde*, 11 Moo. P.C. 364.

241. Suits in British Courts:—This section restricts the operation of the doctrine of *lis pendens* only to suits in British India. Therefore when a land situate in British India is the subject of proceedings in a foreign Court, a mortgage or sale thereof cannot be affected immediately by those proceedings—*Palani v. Subrahmanian*, 19 Mad. 257. The reason of the rule restricting the application of the doctrine only to suits pending in British Courts is obviously founded upon the fact that in foreign Courts not only the procedure but the remedy may be different and governed by different considerations and laws—*Cox v. Mitchell*, 7 C.B. (N.S.) 55.

“The language of the section, however, is not free from defect, since it takes no account of the final appeal before the Privy Council which exercises the ultimate appellate jurisdiction over the highest Courts in British India”—*Gour’s Law of Transfer*, 4th Ed., Vol. I, p. 512.

“Court of competent jurisdiction”:—See Explanation.

The Court must have *jurisdiction* over the property. Where the property is situate outside the jurisdiction of the Court, it cannot pass a valid decree so as to affect an alienation made *pendente lite*. Therefore where a Hindu widow in possession of land in the mofussil granted a *putni* lease of the same during the pendency of an equity suit in the Supreme Court at Calcutta against her husband’s executors, the lease was held valid as the land was not situated within the (original) jurisdiction of

the Supreme Court—*Bissanath v. Radha Kristo*, 11 W.R. 554. A decree for sale of land in the mofussil passed by the Supreme Court of Calcutta will not have any effect on the land and so cannot bind a purchaser *pendente lite*—*Anandamoyi v. Dhanendra*, 16 W.R. (P.C.) 19, 14 M.I.A. 101. But if the property is partly situated within the original jurisdiction of the High Court and partly outside its jurisdiction, the decree passed by the High Court on a mortgage suit in respect of the property (the suit having been instituted with the leave of the High Court under sec. 12, Letters Patent) would attract the operation of *lis pendens*—*Kiernander v. Benimadhab*, 58 Cal. 598, 134 I.C. 561, A.I.R. 1931 Cal. 763 (767).

Pendency of suit in wrong Court:—It was held under the old section that the words “active prosecution” did include the prosecution of a suit in a *wrong* Court which from defect of jurisdiction was unable to entertain it. Therefore, the doctrine of *lis pendens* applied where the transfer of property took place during the interval between the return of the plaint by the wrong Court and its representation in the proper Court—*Ma Than v. Maung Ba*, 5 Rang. 101, A.I.R. 1927 Rang. 145, (148), 101 I.C. 797; *Tangor Majhi v. Jaladhar*, 14 C.W.N. 322 (324), 5 I.C. 691. But these decisions are no longer good law, because the words “active prosecution” have been omitted, and because the Explanation expressly lays down that the pendency of a suit commences from the date of presentation of the plaint in a *Court of competent jurisdiction*.

242. Suit must not be collusive:—The words “contentious suit or proceeding” have been replaced by the words “suit or proceeding *which is not collusive*.” Under the old section also, it was held that the word “contentious” was used in contradistinction to a friendly or collusive suit—*Bhagirathi v. Raj Kishore*, 1930 A.L.J. 766, A.I.R. 1930 All. 354 (355), 122 I.C. 887; *Bharat Ramanuj v. Srinath*, 49 Cal. 220 (226); *Tangor Majhi v. Jaladhar*, 14 C.W.N. 322 (325), 5 I.C. 691.

A collusive suit is no real suit at all but a mere pretence—*Ahmedbhoy v. Vulleebhoy*, 6 Bom. 703; *Chenvirappa v. Puttappa*, 11 Bom. 708. A collusive suit is a suit in which there is no real contest between the parties—*Bharat Ramanuj v. Srinath*, 49 Cal. 220 (226). The rule of *lis pendens* does not apply to a collusive suit or a suit in which the decree is obtained by fraud or collusion—*Tangor Majhi v. Jaladhar*, 14 C.W.N. 322 (325), 5 I.C. 691. If the proceeding is tainted with fraud or collusion the doctrine of *lis pendens* does not apply. A collusive proceeding whether in the Court of first instance or in a Court of appeal is not a real proceeding but a mere pretence, and a decision arrived at in such a proceeding is binding only on the parties and their privies but not on others (transferees)—*Nuzhat-ud-dowla v. Dilband Begum*, 16 O.C. 225, 21 I.C. 570 (571); *Tangor Majhi v. Jaladhar*, 14 C.W.N. 322 (325), 5 I.C. 691; *Periamurugappa v. Manicka*, 49 M.L.J. 68, A.I.R. 1926 Mad. 50, 87 I.C. 213.

A friendly suit stands on the same footing as a collusive suit, and the rule of *lis pendens* does not apply to a friendly suit, in which there is no contest and the parties bring the suit only to obtain the decree of a Court of Justice declaring their rights as to which they are themselves in perfect agreement—*Jogendra v. Fulkumari*, 27 Cal. 77 (92); *Kathir v. Maremadissa*, 38 Mad. 450 (451). As to whether the doctrine of *lis pendens* applies to *administration suits*, *partition suits*, etc., see Note 244 *infra*.

Suit decreed ex-parte:—The prohibition in this section is only against a suit which is collusive: there is nothing to prevent the doctrine of *lis pendens* from applying to a suit which is decreed *ex-parte*, owing to non-appearance of the defendant—*Krishnappa v. Shivappa*, 31 Bom. 393; *Brojo Kishore v. Miajan*, 11 C.W.N. 1138. The rule of *lis pendens* applies to a suit in which an *ex-parte* decree is passed, which is not fraudulent or collusive—*Ram Bharose v. Rampal*, 42 All. 319; *Bhagirathi v. Raj Kishore*, 1930 A.L.J. 766, A.I.R. 1930 All. 354 (355), 122 I.C. 887.

Suit compromised:—A suit originally contentious (*i.e.*, non-collusive) does not cease to be so, merely because it is subsequently *compromised* by the parties. This section should be construed as applying to a suit originally contested but subsequently compromised, provided that such compromise is not tainted by fraud or collusion—*Annamalai v. Malayandi*, 29 Mad. 426 (F.B.) (overruling *Vythiadayan v. Subrahmanyam*, 12 Mad. 439); *Bhagirathi v. Raj Kishore*, 1930 A.L.J. 766, A.I.R. 1930 All. 354 (355), 122 I.C. 887; *Ramdulari v. Upendra*, 4 Pat. 619, 90 I.C. 251, A.I.R. 1925 Pat. 462; *Moti Lal v. Preo Lal*, 13 C.W.N. 226 (232); *Bharat Ramanuj Das v. Srinath Chandra*, 49 Cal. 220 (227), 25 C.W.N. 806; *Parvati v. Govinda*, 45 M.L.J. 682, A.I.R. 1924 Mad. 359; *Periamurugapa v. Manicka*, 49 M.L.J. 68, 87 I.C. 213, A.I.R. 1926 Mad. 50; *Sat Narain v. Badri*, 4 O.W.N. 1275, 107 I.C. 556, A.I.R. 1928 Oudh 146 (148); *Dhiraj v. Dinanath*, 6 N.L.R. 140, 8 I.C. 288 (289); *Landon v. Morris*, (1832) 2 L.J. Ch. 35; *Windham v. Windham*, (1667) 2 Eq. Cas. Abr. 280; *Norris v. Ite*, (1894) 152 Ill. 190; *McIlwrath v. Hollander*, (1880) 73 Missouri 105; *Partridge v. Shepherd*, (1886) 12 Pacific 480; *Turner v. Babb*, (1875) 60 Missouri 342. The fact that a sum of money was paid by one party to induce the other party to agree to a compromise decree does not make the doctrine of *lis pendens* inapplicable—*Ramdulari v. Upendra*, 4 Pat. 619, A.I.R. 1925 Pat. 462, 90 I.C. 251. As to the effect of a compromise decree, see 50 All. 290 under Note 250.

243. Immoveable property:—The doctrine of *lis pendens* enunciated in this section applies only to cases where *immoveable* property is the subject matter of the suit—*Maharaja Bahadur v. Abdul Rahim*, 62 I.C. 900 (Pat.); *Wigram v. Buckley*, (1894) 3 Ch. 483. Where the property is moveable, sufficient protection will be afforded by O. XXXIX, r. 1, and O. XX, r. 20 of the Civil Procedure Code, 1908.

But the *principle* of this section applies to moveables also. "The fact that sec. 52 of the T. P. Act relates only to immoveable property should not make us blind to the consideration that the legal principle underlying it might appropriately be applied to moveables also, in cases where the alienee of the moveables is proved to have had notice of the pending litigation at the time of the alienation"—*Talari Kovalu v. Viswanathan*, 1 L.W. 587, 25 I.C. 133. But in *Maharaj Bahadur v. Abdul Rahim*, 62 I.C. 900 (901) (Pat.), their Lordships felt doubt whether the principle of *lis pendens* applied to moveable property such as *money*.

This section applies where immoveable property is transferred pending a suit. If a preliminary *decree* for sale of a mortgaged property is sold by the mortgagee after the passing of the decree, the doctrine of *lis pendens* applies, because, although a decree is not by itself immoveable property, still the decree for sale of immoveable property represents all the interest which the mortgagee has in the property, and this transfer

of the decree carries with it a transfer of that *interest in immoveable property*, which after the transfer obviously does not remain in the mortgagee but passes with the decree to the assignee—*Chunni Lal v. Abdul Ali*, 23 All. 331 (335).

244. Right to property must be directly and specifically in question:—"The *lis pendens* being a technical expression well known, it seems to me to be perfectly clear that it always implies a claim of right or a claim to charge specific property"—*per* Cairns, L.J. in *Ex-parte Thornton*, L.R. 2 Ch. 171 (178). For the doctrine of *lis pendens* to affect an alienation, it is essential that the property transferred must *be directly and specifically* involved in the suit during the prosecution of which it was transferred. The question involved in the suit must directly affect an interest in the immoveable property and not merely money secured on it. Thus, where a suit is on a promissory note, the claim is limited to a money demand, and at least only a money decree can be passed against the defendant; and the fact that the money-decree may be satisfied out of his property does not make the property directly and specifically in issue in the suit—*Maung Ta Pan v. Maung Po Thaw*, 3 Bur.L.T. 115, 8 I.C. 1208 (1209). So also, where in a suit for the recovery of the sums claimed to be due on a mortgage, only a *money-decree* not constituting any debt against the mortgaged estate was passed, *held* that so long as this decree remained unreversed the suit could not be regarded as one in which a right to immoveable property was directly and specifically in question within the meaning of this section—*Chatterput v. Maharaj Bahadur*, 32 Cal. 198 (212, 217) (P.C.). A proceeding under O. 34, r. 6 is not a proceeding in which a right to immoveable property is directly or specifically in question, because the decree which is passed in such proceeding is a mere *money-decree*—*Badri v. Hazari*, 7 O.W.N. 123, A.I.R. 1930 Oudh 93 (95).

But where the estate of a deceased person is under administration by the Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration—*Chatterput v. Maharaj Bahadur*, 32 Cal. 198 (218) (P.C.). Where during the pendency of a suit brought against the trustees for the construction of the trust-deed, for the ascertainment of the respective rights of the parties interested thereunder and for directions as to the administration of the trust, one of the beneficiaries alienates the property covered by the trust, the alienee takes the property subject to the orders and directions that may be given by the Court—*Puran Chand v. Monmotho*, 55 Cal. 532 (P.C.), 32 C.W.N. 629 (633), 108 I.C. 342, A.I.R. 1928 P.C. 38. Where a creditor of the deceased brought a suit against the heirs of the deceased for recovery of the sum due to him and, if necessary, for administration of the estate and the appointment of a receiver, *held* that as there was no specific property mentioned in the plaint, the suit was not one in which a right to immoveable property was directly and specifically in question, merely because the plaintiff included in his plaint a general prayer that if necessary the estate should be administered by and under the directions of the Court—*Bepin Krishna v. Byomkesh*, 51 Cal. 1033 (1042), A.I.R. 1925 Cal. 395, 84 I.C. 880.

A *suit for rent* is not a suit in which any right to immoveable property is directly and specifically in question. It is primarily a suit for money,

and although rent is a first charge on the property, no charge is created in any event before decree. The suit by itself can hardly be regarded as a claim to charge specific property—*Syed Jaynal Abedin v. Hyder Ali*, 55 Cal. 701, 32 C.W.N. 268 (271, 272), A.I.R. 1928 Cal. 441. The rights referred to in this section are rights such as arise with regard to sale, specific performance, lease and so on; a mere *claim for rent* is not a 'right to immoveable property' within the meaning of this section—*Dhirendra v. Charushashi*, A.I.R. 1926 Cal. 191, 90 I.C. 431.

A *suit for specific performance* of a contract for sale or lease of immoveable property is a suit in which the immoveable property is directly and specifically involved within the meaning of this section, and the purchaser *pendente lite* is bound by the result of the suit—*Moti Lal v. Preo Lal*, 13 C.W.N. 226 (232); *Jahar Lal v. Bhupendra*, 49 Cal. 495 (499); *Vedachari v. Narasimha*, 45 M.L.J. 825, A.I.R. 1924 Mad. 307, 76 I.C. 793; *Hadley v. London Bank*, (1865) 3 DeG. J. & S. 63; *Bhaskar v. Shankar*, 26 Bom.L.R. 518, A.I.R. 1924 Bom. 467, 80 I.C. 453.

Maintenance-suit:—Where a Hindu widow brought a suit for maintenance against her step-son merely enumerating in the plaint the immoveable properties of her husband in the hands of her step-son, but not *charging* any specific property with the maintenance, *held* that the plaintiff enumerated the properties merely to enable the Court to determine what amount of maintenance might fairly be given, and there was not any right to immoveable property directly and specifically in question. Therefore a mortgage of the properties by the defendant during the pendency of the suit was not affected by the doctrine of *lis pendens* under this section—*Manika v. Ellappa*, 19 Mad. 271 (272, 273). But where in a suit for maintenance, the widow claims that her maintenance should be made a *charge* on the property, this section applies and an alienation of the property made during the pendency of such a suit is affected by the rule of *lis pendens*—*Dose Thimanna v. Krishna*, 29 Mad. 508 (510); *Venkatrama v. Rangiah*, 46 M.L.J. 258, A.I.R. 1924 Mad. 449 (450), 77 I.C. 504.

But the case is different when a *wife* brings a suit for maintenance against the *husband*. The husband's liability to maintain the wife is a personal and absolute obligation *independent of any property*; and when a wife brings a suit against the husband for maintenance and asks for a charge on the property belonging to him, she does not ask for any right directly and specifically in respect of the property. Of course, in order to get maintenance properly paid she is entitled to ask for a charge, and the Court in decreeing maintenance gives her a charge on the property. But the mere fact that she mentions in the plaint all the property belonging to her husband would not make the property the subject matter of the suit. Consequently, a transfer of the property by the husband pending the suit is not affected by sec. 52—*Rattamma v. Seshachalam*, 52 M.L.J. 520, A.I.R. 1927 Mad. 502, 101 I.C. 806. See also *Official Receiver v. Subbamma*, A.I.R. 1927 Mad. 403 (404), 99 I.C. 564. If the wife's suit is decreed, and the decree gives her a charge on the property, it cannot be said that the charge is given to her from the date of suit. The charge takes effect from the date of the decree. Therefore, a transfer of property by the husband before the decree is not affected by the rule of *lis pendens*—*Rattamma v. Seshachalam*, *supra*. But the case would be different if the plaint claims a charge on *specific* immoveable property of her husband and the decree also grants such prayer and charges such immoveable pro-

property. In such a case the decree creating a specific charge over specific items of property mentioned in the plaint operates to give her a charge as from the date of the *plaint* and not as from the date of the decree. A simple money-creditor of her deceased husband has no priority over such a charge granted by the maintenance decree, and a purchaser in a sale held in execution of a simple money-decree obtained by the creditor during the pendency of such maintenance suit, is not entitled to priority over a person who purchases such property in execution of the maintenance decree—*Seetharamanujacharyulu v. Venkatasubamma*, 54 Mad. 132, 59 M.L.J. 485, A.I.R. 1930 Mad. 824 (831, 832), 127 I.C. 809, distinguishing (and also dissenting from) *Rattamma v. Seshachalam*, *supra*.

Suit for dower:—Where a Mahomedan widow brought a suit for dower against the heir of her deceased husband and for *possession* of her husband's property in the hands of the heir, the rule of *lis pendens* applied if there was an alienation during the pendency of the suit, even though the decree was not for possession but was passed for an account declaring the liability of the defendant to pay the amount decreed out of the assets coming into his hands—*Bazayet Hossein v. Dooli Chand*, 4 Cal. 402 (409) (P.C.). The doctrine of *lis pendens* is also applicable to a suit in which the widow merely claims the dower, although it contains neither any prayer for possession of the property nor any prayer that any specific items should be charged with the dower, if the decree passed in the suit is such that it can only be executed *against the property* of the husband in the possession of the husband's heirs—*Yasin Khan v. Yar Khan*, 19 All. 504 (505). But the Oudh Chief Court is of opinion that a Mahomedan woman claiming dower debt cannot claim a charge on any specific portion of her husband's property; her claim is a mere money claim, although the decree may be executed against her husband's property; consequently a husband transferring a portion of his property during a suit brought by his wife for dower is not affected by this section, especially if the remaining property is not insufficient to satisfy the dower claim—*Abdul Rahman v. Inayati*, 7 O.W.N. 1181, 130 I.C. 131, A.I.R. 1931 Oudh 63 (65), dissenting from 19 All. 504, and following *Bhola Nath v. Maqbulunnissa*, 26 All. 28 (in which 19 All. 504 was doubted).

Administration-suit:—Speaking generally, the doctrine of *lis pendens* does not apply to administration suits, because in such a suit though the property may be said to be directly in question, it cannot be said to be *specifically* in question. But if in such a suit a particular portion of the estate is sought to be affected in a particular way, the doctrine would apply—*A. L. A. R. Chetty Firm v. Mg. Thwe*, 1 Bur.L.J. 133, A.I.R. 1923 Rang. 69 (70), 74 I.C. 54. An administration-suit brought by a creditor or next-of-kin of the deceased against the administrator for the administration of the estate of the deceased by or under the directions of the Court is not a suit in which any property is directly or specifically in question and consequently a sale of a property of the deceased made by the administrator pending the suit cannot be set aside on the ground of *lis pendens*. So also, where the claim in the administration suit was really one for a *money-decree* to be calculated on a realisation of the entire estate, it cannot be said that the right to any property was specifically in question in that suit, and consequently the rule of *lis pendens* could not apply to a sale of property pending that suit—*Lee Lim Ma Hock v. Saw Mah Hone*, 2 Rang. 4 (19), A.I.R. 1924 Rang. 221, 79 I.C. 729. Where a creditor or a next-

of-kin instituted an administration suit against an executor or administrator, the mere institution of the suit or obtaining of a mere administration-decree will not bring the doctrine of *lis pendens* into operation and does not deprive the executor or administrator of his general power to dispose of the assets, unless and until the plaintiff has obtained an order appointing a receiver of the estate or at least an injunction restraining the executor or administrator from exercising the powers vested in the executor or administrator—*Ibid* (at p. 21) following *Berry v. Gibson*, L.R. 8 Ch. App. 847. A suit in which one of two co-heirs sues the other heir, who is administrator of the estate, for his share of the estate and asks for the profits of the estate, in which a preliminary decree is given declaring that the plaintiff is entitled to a half share of the estate and directing that the usual accounts and enquiries be taken and made, in which a commissioner is appointed to take those accounts and make enquiries, and in which a final decree is given for the half share in the estate as found by the commissioner, is in fact an administration suit, and the doctrine of *lis pendens* does not apply to such a suit—*Ma Kin v. Ma Bwin*, 5 Rang. 266, A.I.R. 1927 Rang. 186 (187), 103 I.C. 264. A creditor's action for general administration of an estate may be a sufficient *lis pendens* so as to entitle the plaintiff to priority over a purchaser or mortgagee from the defendant taking subsequently to the institution of the *lis*, if the plaintiff, previously to the purchase or mortgage, has sufficiently indicated his intention to make the *particular estate specifically liable* for his debt; a *mere general claim* for administration is not of itself a sufficient indication of such intention—*Price v. Price*, (1887) 35 Ch. D. 297. In an administration suit brought in 1914 by the heir of the deceased, at first there was no specific mention of any property and no indication as to the property which was claimed, and the Court passed a preliminary administration decree in January 1917, and then the proceeding went before a Commissioner for an enquiry as to what the estate consisted of. The land in dispute was then claimed before the Commissioner to be part of the estate, and the Commissioner submitted his report in April 1917 recording his finding that the land was part of the estate. In 1926, the defendant in that suit transferred the land. *Held* that when the suit was first filed, there was no property directly or specifically in question, but when the matter went to the Commissioner, before whom the land was specifically claimed, and he reported that the land was part of the estate, the doctrine of *lis pendens* came into operation, and the subsequent transfer of the land was affected by it—*K. Y. Chettyar Firm v. Jamila*, 7 Rang. 734, 121 I.C. 792, A.I.R. 1930 Rang. 132 (136).

Where in an administration suit brought by the creditor against the heirs of the deceased, an administration order was made which directed that an account should be made of the moveable and immoveable properties of the deceased, and that the estate of the deceased should be applied in payment of his debts and funeral and testamentary expenses in due course of administration, *held* that the estate of the deceased came under the administration of the Court and consequently a mortgage created by the heir after the passing of that order would be subject to any disposition of the deceased's estate that might be made by the Court in due course of administration—*Bepin Krishna v. Byomkesh*, 51 Cal. 1033 (1044), A.I.R. 1925 Cal. 395, 84 I.C. 880. See also *Puran Chand v. Monmotho*, 55 Cal. 532 (P.C.) cited at p. 200, *ante*.

A suit brought by a legatee for a declaration of his right under a will does not fall under this section; and therefore, if during the pendency of such a suit, a creditor of the deceased testator brings a suit, obtains a decree and in execution thereof brings some properties of the deceased to sale, the sale is not affected by the legatee's suit, but would bind the legatee—*Chaturbhujadoss v. Rajamanicka*, 54 Mad. 212, 60 M.L.J. 97, A.I.R. 1930 Mad. 930 (938), 129 I.C. 469.

Interpleader suit:—Where a person purchases a property from one of the parties to an interpleader suit, in which a decree creating a charge on the property has been passed, the purchase is *pendente lite*, and the purchaser is bound by the charge—*Arunachalam v. Pratapasimha*, 60 M.L.J. 79, 33 L.W. 391, 129 I.C. 63, A.I.R. 1930 Mad. 988 (990).

Suit for partition:—This section does not apply to a suit for partition in which neither the shares of the parties nor the rights of the parties to the shares are disputed. "In this case, the question is, whether the *mode* in which the lands should be allotted between the ascertained sharers affects the right to any property specifically. I do not think it does. The shares are ascertained shares, and the only office that the Court has to perform is to divide the property which belongs to them all, in such plots of land as are most convenient for the enjoyment of each"—*Shaik Khan Ali v. Pestonji*, 1 C.W.N. 62 (64); *Ramchandra v. Jaideo*, A.I.R. 1928 Nag. 198 (199), 109 I.C. 566. In other words, if the *rights* are not disputed and the *shares are ascertained*, and the Court has only to divide the plots of land between the co-sharers in a convenient manner, the suit cannot be said to be one in which the "right to immoveable property is directly and specifically in question." But if the shares are not ascertained and the Court has to decide the question as to whether the defendant is entitled to a share, or to decide what share is to be taken by each sharer, then this section unquestionably applies. The quantum of interest to which each member is entitled is a right to immoveable property, and since it is directly and specifically involved in the suit, the doctrine of *lis pendens* applies, and the final decision of the suit is binding upon the transferee purchasing *pendente lite*—*Jogendra v. Fulkumari*, 27 Cal. 77 (92); *Nand Kishore v. Lallu*, 1930 A.L.J. 1286, A.I.R. 1931 All. 45 (47); *Chandan v. Fakirgir*, 11 N.L.R. 21, 27 I.C. 940 (942).

245. Property must be definitely described:—In order that the rule of *lis pendens* may apply, the plaint in the suit must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of the litigation. In other words, in order that *lis pendens* may be created, it is essential that the property involved in the suit must be described by such definite and technically legal description that its identity can be made out by the description alone, or that there be such a general description of its character or status that upon inquiry the identity of the property involved in the litigation can be ascertained—*Hukum Chand on Res Judicata*, p. 728; *Loke Nath v. Achutananda*, 15 C.L.J. 391, 2 I.C. 85 (86); *Miller v. Sherry*, 2 Wallace 237. Where there is nothing in the proceedings, except the simple description of the property, which will tend to put the public on enquiry or give a clue for further and more definite knowledge, the description must be so definite that any one reading it can learn thereby what property is intended to be made the subject of the litigation. On the other hand, if enough appears in the proceedings to put a pur-

chaser on guard, although they do not in themselves describe the property with that particularity which amounts of itself to complete identification, *lis pendens* would be created. In other words, in order to make the doctrine of *lis pendens* applicable, the property must be described in the pleadings with sufficient accuracy—*Loke Nath v. Achutananda*, 15 C.L.J. 391, 2 I.C. 85 (87). Whether the misdescription of the property is of such a character as to render the identification of the property impracticable, is a question of fact which must be decided with reference to all the records of the suit—15 C.L.J. 391. But misdescription of the property will not prevent the application of the rule of *lis pendens*, in the case of a person having *knowledge* or *notice* of the true state of things—*Bepin Krishna v. Jogeshwar*, 26 C.W.N. 36, 34 C.L.J. 256, A.I.R. 1921 Cal. 730, 66 I.C. 345.

If any amendment is made *pendente lite* in the plaint by a change in the description of the property, the amendment dates from the time it is made and will not relate back to the date of the institution of the suit so as to affect a prior alienation—*Wali Bandi v. Tabeya Bibi*, 41 All. 534, 50 I.C. 919. Plaintiff got a decree in 1912 for foreclosure but by mistake a particular piece of property was not included in the decree. Subsequently the defendant attached that property in execution of a decree obtained by him, and brought it to sale. In 1914 the plaintiff obtained amendment of his decree by the inclusion of the above property, and then brought a suit for declaration that the property was not liable to be attached or sold in execution of the defendant's decree. *Held* that the plaintiff was not entitled to the declaration. The doctrine of *lis pendens* was not applicable, in as much as at the time of the auction-purchase no suit or proceeding was pending in respect of this property—*Ram Chandra v. Bhagwan*, 57 I.C. 652.

246. "Transferred":—Transfer includes the grant of a *lease*, and therefore a person taking a lease of immoveable property during the pendency of a suit or proceeding relating thereto will be affected by this rule—*Madan Mohan v. Rajkishori*, 21 C.W.N. 88, 39 I.C. 182 (183); *Kiran Chandra v. Dutt & Co.*, 29 C.W.N. 94, A.I.R. 1925 Cal. 251; *Nisar v. Sundar*, 50 All. 202, 104 I.C. 292, A.I.R. 1927 All. 657 (658); *Nageshar v. Gudar*, 4 O.W.N. 660, 2 Luck. 659, A.I.R. 1927 Oudh 603 (604); *Girdhari-lal v. Liladhar*, 33 Bom.L.R. 1123, A.I.R. 1931 Bom. 539, 134 I.C. 1223; *Ramasami v. Govinda*, 38 I.C. 1 (4), 31 M.L.J. 839. An agricultural lease (in C. P.) is a transfer, and it lies on the party relying on the lease to show that it did not affect the rights of the other party to the litigation—*Shri Ganesh v. Pandurang*, 14 N.L.R. 133, 46 I.C. 762; *Matilal v. Ganpatrao*, A.I.R. 1924 Nag. 211; *Narain v. Abdul Majid*, 15 C.P.L.R. 6; *Dhiraj v. Dinanath*, 6 N.L.R. 140, 8 I.C. 288 (290); *Chandan Singh v. Fakirgir*, 11 N.L.R. 21, 27 I.C. 940 (941); *Maroti v. Tulsi*, A.I.R. 1927 Nag. 299. If the agricultural lease does not affect the rights of the other party, it will not come within the mischief of the rule. Thus, where an agricultural lease was granted by the mortgagor in the ordinary course of management, and it was for the benefit of the mortgagee as he would clearly get the lessor's share of the crops, *held* that this section did not apply—*Sakharam v. Tukaram*, A.I.R. 1927 Nag. 316 (318). Where during the pendency of a suit on a mortgage of the proprietary right in a field, a lease of the land was granted in good faith, and with no intention of affecting the rights which the mortgagees would acquire if they obtained a final decree for

foreclosure, *held* that Sec. 52 had no application—*Seth Misrilal v. Bhimrao*, A.I.R. 1927 Nag. 295 (296). A lease for a year given by a mortgagor who was allowed to remain in possession, pending the execution-sale of his property, was an ordinary and reasonable incident of an interim beneficial enjoyment, and was not affected by the doctrine of *lis pendens*, and the lessee was entitled to the crops raised by him for the year—*Subbaraju v. Seetharamaraju*, 39 Mad. 283 (285) (dissenting from *Thakur Prasad v. Gaya Sahu*, 20 All. 349); *Radhika v. Radhamani*, 7 Mad. 96 (99); *Karu v. Pandia*, A.I.R. 1924 Nag. 226 (227), 75 I.C. 874.

247. “Or otherwise dealt with”:—The words “or otherwise dealt with” include partition; and therefore a *partition* of the property among the defendants *pendente lite* does not affect the right of the plaintiff—*Isvar v. Dattu*, 37 Bom. 427, 19 I.C. 885 (887, 890). The words also include a *contract* for sale—*Kubra Bibi v. Khudaija*, 20 O.C. 13, 38 I.C. 582 (584).

But an *adoption pendente lite* is not to be regarded as an alienation pending the suit. If a legitimate son had been born to C during the suit, such son, to be bound by a pending suit affecting his father's ancestral property, must have been made a party, and a son adopted during a suit is in the same position. The one at his birth and the other at his adoption would take a vested interest in his father's property according to the Hindu Law in the Presidency of Bombay. The circumstance that C might have adopted the plaintiff for the purpose of endeavouring to defeat the *bakshishpatra* did not alter the case, because as a sonless Hindu he had a right to adopt a son—*Rambhat v. Lakshman*, 5 Bom. 630 (635).

So also, the mere admission of the execution of a sale-deed before the registering officer relating to a property covered by such a deed is not ‘dealing with the property’ within the meaning of the section—*Rafuddin v. Brijmohan*, 9 N.L.R. 155, 21 I.C. 602. So also, the receiving of the balance of the purchase-money after the institution of the suit does not amount to ‘transferring or otherwise dealing with’ the property—*Ibid*.

If a subsequent mortgagee pays off a prior mortgage, and is entitled under the law to claim a charge in respect of such payment, the doctrine of *lis pendens* would not affect him, for the taking over of the prior debt would not amount to any dealing with the property in suit. It would be a mere continuance of a pre-existing paramount liability—*Shafiqullah v. Samiullah*, 52 All. 139, A.I.R. 1929 All. 943 (945), 1930 A.L.J. 57.

248. Transfer by persons other than parties to the suit:—The rule in this section applies where the property is transferred by a *party* to the suit or proceeding; and those persons only are affected by *lis pendens* who purchase from any of the parties to the litigation. Thus, where a decree-holder is seeking to establish his right to attach and sell his judgment-debtor's property by a suit against a successful claimant, the judgment-debtor is *not a party* to the claim suit, and if another decree-holder attaches the same property and brings it to sale, the auction-purchaser who purchases at such sale is not affected by the doctrine of *lis pendens* and is not affected by a subsequent sale held in execution of the decree of the first-named decree-holder—*Pethu Aiyar v. Sankaranarayana*, 40 Mad. 955 (958), 32 M.L.J. 374, 38 I.C. 778.

So also, the operation of the law of *lis pendens* cannot extend to persons whose title is paramount to that of the parties to the suit, or

whose title is not in any way connected with them. Therefore where pending a suit between a *pattadar* and his mortgagee, the landlord got the land sold for default in payment of rent, *held* that the landlord's right being paramount to that of his *pattadar*, the suit did not affect his statutory power of sale under the Madras Rent Recovery Act, and the purchaser was also unaffected by the suit—*Munisami v. Dakshinamurthi*, 5 Mad. 371.

The words "by any party" are not merely descriptive; they refer to the *time* at which the transaction which it is sought to assail actually took place. Therefore, the doctrine of *lis pendens* does not apply where the transfer was made, during the suit, by a person who was not a party to the suit *at the time* of the transfer but who was *subsequently* made a party—*Ammayya v. Narayana*, 21 L.W. 125, 86 I.C. 187, A.I.R. 1925 Mad. 487; *Bala Ramabhadra v. Daulu*, 27 Bom.L.R. 38, A.I.R. 1925 Bom. 176, 86 I.C. 126; *Sheoratan v. Kamta Prosad*, 11 Pat. 485, 139 I.C. 78, A.I.R. 1932 Pat. 270. Thus, in 1910 V made a gift of his land to his daughter R. The plaintiff sued V in 1914 to recover possession of the land. V died pending the suit and R was brought on the record as V's legal representative. But before she was so brought on the record, she had sold the land to the defendants. The plaintiff thereupon sued the defendants to recover possession of the land from them on the ground that the sale was affected by the doctrine of *lis pendens*. *Held* that R was not a party to the suit of 1914 and the sale to defendants took place before she was brought on the record, and therefore the doctrine of *lis pendens* did not apply—*Bala Ramabhadra v. Daulu*, (*supra*).

249. Effect of transfer pendente lite:—The words "cannot be transferred so as to affect the rights of any other party thereto" show that the transfer *pendente lite* is not *ipso facto* void but is only voidable at the option of the party whose interests are affected thereby. See Bennett on *Lis pendens*, p. 234. The rule is not that an alienation *pendente lite* is absolutely void, but that the transfer will not affect the rights of any party thereto under any decree or order that may be made in the suit. In other words, the transfer will be available and valid, subject, however, to the result of the suit. Thus, where during the pendency of a partition suit between A and B, A mortgages the suit property, and then the Court declares A to be entitled to a half share of the property, the mortgage would not be absolutely void but would be binding on the moiety that has been granted to A, though it would not be binding on the other moiety granted to B—*Rangaswami v. Sundarapandia*, A.I.R. 1928 Mad. 635 (637); 110 I.C. 548.

The purchaser can have no higher right than the vendor, and the sale having been made during the prosecution of the litigation, the purchaser must be bound by the result of the litigation—*Shib Chandra v. Lachmi Narain*, 33 C.W.N. 1091 (1096) (P.C.), 56 I.A. 339, A.I.R. 1929 P.C. 243, 119 I.C. 612. In transfers of this kind the transferee stands in the shoes of the transferor, and takes the title of the latter subject to the pending litigation. If the litigation terminates in favour of the transferor, the title of the transferee becomes valid; if however the transferor fails, the interest acquired by the transferee becomes voidable, and the other party, if his rights in the subject matter of the litigation are affected by the alienation, may eject the transferee from the property. *Hukum Chand on Res Judicata*, p. 730. If the transferor succeeds in the Court of first instance but fails in the Appellate Court, and the transfer was

made while the suit was pending in the first Court, the transferee is bound by the decision of the Appellate Court, and cannot obtain possession under the transfer. It makes no difference to the application of the doctrine of *lis pendens* that the decree of the Court of first instance was in favour of the transferor. That decree was open to appeal, and the decree being appealed against, it was the decree of the Appellate Court that was the decree in the suit, and the parties were bound by that decree—*Gobind Chunder v. Guru Churn*, 15 Cal. 94 (99). In other words, the “decree or order which may be made therein” means the *final* decree or order in the suit. This is also borne out by the words of the Explanation which says that the *lis* continues “until the suit or proceeding has been disposed of by a *final* decree or order.”

The word ‘rights’ in this section (“so as not to affect the rights of any other party” etc.) has reference not only to substantive rights but also to a matter of procedure. Thus, it includes a right to execute a decree—*Krishnabai v. Savlaram*, 51 Bom. 37, A.I.R. 1927 Bom. 93 (95), 29 Bom.L.R. 60, 100 I.C. 582.

Notice:—The doctrine of *lis pendens* is independent of notice. A purchase made of property actually in litigation, though for valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice—Story’s Equity Jurisprudence, Sec. 405; *Baswan v. Natha*, 11 O.L.J. 452, 1 O.W.N. 319, 82 I.C. 747, A.I.R. 1925 Oudh 30; *Sohan Lal v. Jot Singh*, 16 O.C. 148, 20 I.C. 458. Where a litigation is pending, the decision in the suit shall be binding not only on the litigating parties but also on those who derive title under them by alienations made pending the suit, whether such alienees *had or had not notice* of the pending proceedings. If this were not so, there would be no certainty that the litigation would ever come to an end—*Bellamy v. Sabine*, 1 DeG. & J. 566 (*per* Lord Cranworth); *Lakshmandas v. Dasrat*, 6 Bom. 168; *Basappa v. Bhimangowda*, 52 Bom. 208, A.I.R. 1928 Bom. 65 (66); *Girdharlal v. Liladhar*, 33 Bom.L.R. 1123, 134 I.C. 1223, A.I.R. 1931 Bom. 539; *Dodey Ram v. Gulkando*, A.I.R. 1929 All. 601, 118 I.C. 660. The doctrine of *lis pendens* is not based on the equitable doctrine of notice but on the ground that it is necessary to the administration of justice that the decision of a Court in a suit should be binding not only on the litigating parties but on those who derive title from them *pendente lite*, whether with notice of the suit or not—*Krishnabai v. Savlaram*, 51 Bom. 37, 100 I.C. 582, A.I.R. 1927 Bom. 93 (95) (*per* Fawcett J.); *Nathaji v. Nana*, 9 Bom.L.R. 1173.

250. “Any other party”:—The doctrine of *lis pendens* is intended to protect the parties to the litigation against alienations by their *opponents* pending the suit. Therefore, if the first defendant sells a property to the second defendant pending the suit, the third defendant cannot dispute the validity of the sale on the ground of *lis pendens*. In other words, the prohibition contained in this section is inapplicable between parties to a suit who are ranged on the *same side* and between whom there is no issue for adjudication. The words ‘any other party’ in this section mean any other party who can be said to be arrayed on the *opposite* side to the party alienating, owing to the existence of some issue between them upon which the Court is called to adjudicate in the suit; the words mean any other party between whom and the party alienating there is an issue for decision

which might be prejudiced by the alienation—*Krishnaya v. Mallaya*, 41 Mad. 458 (463).

During the pendency of a suit for possession of land brought by T against D, the land was mortgaged by T to W. The suit ended in a compromise, whereby the debt due to the mortgagee was agreed to be paid by D (who obtained a part of the property under the compromise) and the mortgagor was absolved from payment of the debt. The debt was not made a charge on any property in the hands of D but was described merely as a personal covenant. Afterwards, the mortgagee brought a suit to enforce the mortgage against D. *Held* that Sec. 52 has been enacted for the benefit of the "other party" and not for the benefit of the party making the transfer. The other party (*viz.*, D) is not affected by the transfer, and the mortgagee cannot enforce his mortgage against D. Moreover, under the compromise the mortgage debt was converted into a purely personal contract, and no property was charged or earmarked. Therefore, the mortgagee cannot touch the property which D, the other party, got under the term of the compromise-decree—*Shyam Lal v. Sohan Lal*, 50 All. 290, 25 A.L.J. 77, 106 I.C. 255, A.I.R. 1928 All. 3 (9).

251. Transfer made before commencement of suit:—Where a right is acquired *before* the suit but is perfected and paid for after the institution and during the pendency of the suit, the rule in this section does not apply, and therefore a deed of sale or mortgage made prior to the institution of the suit may be registered *pendente lite* (because the deed on registration takes effect from the date of execution)—*Venkataramana v. Rangiah*, 41 M.L.J. 399, A.I.R. 1922 Mad. 249, 70 I.C. 212; *Guru Basappa v. Setra Santhappa*, A.I.R. 1925 Mad. 359, 48 M.L.J. 496; *Veerakutty v. Ramaswami*, 32 I.C. 431; *Rafuddin v. Brijmohan*, 9 N.L.R. 155, 21 I.C. 602. The party relying on sec. 52 must establish that his suit was instituted before the execution of the deed of transfer, *i.e.*, that the transfer took place after the institution of the suit. If the execution of the deed of transfer takes place before the institution of the suit, the doctrine of *lis pendens* cannot apply even though the deed is registered during the pendency of the suit—*Rafuddin v. Brijmohan*, 9 N.L.R. 155, 21 I.C. 602 (603). A mortgage executed before the institution of the suit may be *enforced* (by a sale in pursuance of mortgage-decree) after the suit. The doctrine of *lis pendens* does not apply to previously existing transfers or to legal proceedings taken to enforce those transfers—*Chinnaswamy v. Darmalinga*, 63 M.L.J. 394, 139 I.C. 309, A.I.R. 1932 Mad. 566 (573).

In a Bombay case an opinion was expressed that if A executed a deed of gift of certain property in favour of B, and then during the pendency of a suit in respect of the property B got the deed of gift registered, the registration was invalid because by registering the document he transferred the property to himself *pendente lite*—*Subba Rama v. Venkatasubba*, 48 Bom. 435 at p. 441 (*per* Macleod, C.J.). But this should be taken as a mere *obiter* and not as an authoritative pronouncement (because it was not a case under sec. 52). Moreover the case has been overruled by the later Full Bench decision in *Atmaram v. Vaman*, 49 Bom. 388 (F.B.), 27 Bom. L.R. 390.

The rule of *lis pendens* does not affect a person who purchased by contract and entered into possession before the commencement of the suit, and then *pendente lite*, without actual notice, fulfilled his contract, and

took a deed for the property. See *Hukum Chand on Res Judicata*, p. 709.

So also, this section does not apply where the sale actually took place before the commencement of the suit but by virtue of a compromise entered into in the suit the validity of the sale-deed was accepted by the other party—*Krishnaji v. Motilal*, 31 Bom.L.R. 476, A.I.R. 1929 Bom. 337 (339), 122 I.C. 66.

Where a lease was granted by the mortgagor before the institution of the mortgage suit, the lessees can maintain their possession as against the purchaser in execution of the decree in the mortgage suit—*Madan Mohan v. Rajkishori*, 21 C.W.N. 88, 17 C.L.J. 384, 39 I.C. 182 (185). When an auction sale took place before the institution of the suit, the fact that the sale certificate was issued pending the suit does not bring in the doctrine of *lis pendens*. Though under sec. 316, C. P. Code, 1882, the title of the auction-purchaser is made to date from the certificate and not before, still his equitable title arose on and was completed with effect from the date of the sale; such title was incomplete until the sale was confirmed, but on confirmation it related back to the date of sale—*Lanka Gopalam v. Lanka Ratnamma*, 28 M.L.J. 666, 26 I.C. 353 (355).

“Except under the authority of the Court”:—If a transfer is to be made free from defect, this clause authorises the parties to apply to the Court before which the suit is pending, and any transfer made by permission of the Court will not be invalid. If, however, the order of the Court is obtained by fraud (*e.g.*, where the order is issued under a misapprehension of which the applicant was the wilful cause), any alienation made under such order will not be free from the rule.

252. Plea of *lis pendens*:—A plea of *lis pendens* raised in the first Court but not pleaded in the written statement ought to be tried by the Appellate Court, when no further facts or evidence than those already on the record are necessary—*Kather v. Maremadissa*, 38 Mad. 450.

53. Every transfer of im-
moveable property,
made with intent to
defraud prior or
subsequent transferees thereof
for consideration, or co-owners
or other persons having an in-
terest in such property, or to
defeat or delay the creditors of
the transferor, is voidable at
the option of any person so de-
frauded, defeated or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously, or for a grossly inadequate con-

53. (1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a

sideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this subsection, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

Amendment:—The whole section has been re-drafted by sec. 15 of the T. P. Amendment Act (XX of 1929). The following amendments have been made:—

(a) The first para of the old section which related both to transferees and creditors, has been split up into two sub-sections of which sub-section (1) relates to creditors, and sub-section (2) applies to transferees. See Note 253.

(b) The reference to prior transferees and co-owners or other persons interested in the property (1st para of the old section) has been omitted. See Note 268.

(c) The second para of old section has been omitted. See Note 266.

(d) The third para of old section, which was an exception to the whole section, has now been appended to sub-section (1) of the new section. See Note 261.

(e) The 3rd and 4th paras of sub-section (1) and the second para of sub-section (2) are new. See Notes 263 and 269.

The reasons have been stated in proper places.

Analogous laws:—The old section was taken from 13 Eliz. c. 5 and 27 Eliz., c. 4. Both these Statutes applied to Presidency-towns (22 W.R. 60; 6 Mad. H.C.R. 455, 474; 25 Bom. 202, 208-209), and were repealed by the Transfer of Property Act, so far as they applied to those towns. 13 Eliz. c. 5, dealt with transfers made with intent to defeat or delay creditors, and 27 Eliz. c. 4, dealt with transfers made with intent to defraud subsequent transferees for consideration.

The amended section has been framed on the lines of secs. 172 and 173 of the (English) Law of Property Act, 1925.

253. Reasons for splitting up the section:—"The first paragraph of old section 53 consists of two parts, of which the first relating to subsequent transferees is based on section 2 of 27 Eliz. c. 4, and the second relating to creditors is based on section 1 of 13 Eliz. c. 5.

"On the statute 27 Eliz. c. 4, the English decisions are clear to the effect that a voluntary (*i.e.*, *gratuitous*) transfer of land, afterwards made the subject of a conveyance for valuable consideration, may be avoided by the subsequent purchaser, although in making the voluntary conveyance there was no actual fraud and although the purchaser had notice of the settlement: see 1 Smith's Leading Cases, 12th edition, page 27. From the fact that the settlor afterwards conveyed the land to a purchaser for consideration it was inferred that the voluntary conveyance was made with intent to defeat the purchaser. 'The principle appears to be that, by selling the property for a valuable consideration, the settlor so entirely repudiates the former voluntary conveyance and shows his intention to sell, as that it shall be taken conclusively against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser'—*Newman v. Rusham*, 17 Q.B. 723. 'It may be assumed', said Grant, M.R. 'that a voluntary settlement, however free from actual fraud, is by the operation of that statute (27 Eliz., c. 4) deemed fraudulent and void against a subsequent purchaser for a valuable consideration even when the purchase has been made with notice of the voluntary settlement.'

"Following the same principle, Sale J. held in *Joshua v. Alliance Bank of Simla* (1895) 22 Cal. 185, that the words 'may be presumed' in para. 2 of the old section should be construed as equivalent to 'shall be presumed', and that a voluntary transfer of immoveable property afterwards made the subject of a transfer for consideration was void as against the subsequent transferee, even though the subsequent transferee had notice of the previous transfer. The view taken by Sale J., was dissented from by Jenkins, C.J., in *Bai Cooverbai v. Muhammad*, (1905) 7 Bom. L.R. 267. As regards transfers made with intent to defraud creditors, the courts in India have held that the phrase 'may be presumed' in the second paragraph should be given its plain meaning, that is to say, the meaning which it bears in the Indian Evidence Act, 1872, section 3. The result is that the same phrase 'may be presumed' may have one meaning attached to it in case of transfers made to defraud subsequent transferees and another meaning in case of transfers made to defeat or delay creditors. Again, paragraph 3 of the old section can hardly apply to cases where there is a contest between a prior voluntary transfer and a subsequent transfer for consideration.

"Such being the case, it is desirable to split the section into two parts—one dealing exclusively with transfers made with intent to defraud creditors and the other with transfers made to defraud subsequent transferees. In drafting the two sub-sections we have followed the lines of sections 172 and 173 respectively of the English Law of Property Act, 1925."—*Report of the Special Committee* (1927).

254. Application of section:—The principle of this section applies to Hindus and Mahomedans, as it is not inconsistent with their laws—*Rangilbhai v. Vinayak*, 11 Bom. 666; *In re Kahandan*, 5 Bom. 154; *Abdul Hye v. Mir Mahomed*, 10 Cal. 616; *Hormusji v. Cowasji*, 13 Bom. 297.

The principle of this section has been held to be applicable to the Punjab, although this Act does not apply to that province—*Md. Ishaq v. Md. Yusuf*, 8 Lah. 544, A.I.R. 1927 Lah. 420, 101 I.C. 172; *Champa v. Shankar Das*, 14 I.C. 232, 74 P.R. 1912; *Ibrahim v. Jiwan Das*, A.I.R. 1924 Lah. 707, 75 I.C. 1043; *Tapasi v. Raja Ram*, 115 I.C. 417.

255. Transfer:—A *partition* among the members of a joint Hindu family is a transfer within the meaning of this section—*Rasa Goundan v. Arunachela*, 44 M.L.J. 513, 72 I.C. 978, A.I.R. 1923 Mad. 577 (dissenting from *Indoji Jithiaji v. Kothapalli*, 10 L.W. 498, 54 I.C. 146); *Ramaswami v. Kathamuthu*, 24 L.W. 180, 97 I.C. 70, A.I.R. 1926 Journal 167. See also *Chhote Lal v. Lakhimchand*, A.I.R. 1926 Nag. 355.

The execution of a *baimukassa* deed by a husband in favour of his wife is a transfer of property—*Bibi Saira v. Bibi Saliman*, 2 P.L.T. 577, 63 I.C. 111 (113).

Transfer includes a settlement by which the settlor conveys all his interest in the property to trustees, or a surrender by a Hindu widow of her life-interest in favour of the reversioner. See *Natha v. Dhunbaiji*, 23 Bom. 1. A *waqf* is a transfer; and no person can make a *waqf* of his entire property without making arrangement for the payment of his debts. A *waqf* created as a device for defeating creditors is voidable. The Mahomedan law also is to the same effect. Consequently the provisions of sec. 53 apply to a *waqf* created with intent to defraud creditors. Sec. 2 (d) does not prevent this section from applying to the case—*Ahmad Husain v. Kallu Mian*, 1929 A.L.J. 460, A.I.R. 1929 All. 277 (278), 117 I.C. 97; *Bismillah v. Tahsin Ali*, 1930 A.L.J. 616, A.I.R. 1930 All. 462 (465), 124 I.C. 722.

Although the provisions of this section apply only to transfers *by act of parties* and not to transfers *by operation of law* (see section 2, clause *d*), still the principles embodied in this section, being principles of justice, equity and good conscience, should be taken as a guide in cases of transfers by operation of law (*e.g.*, transfer effected by a decree of Court based on an award)—*Akramunnissa v. Mustafa-unnissa*, 51 All. 595, 1929 A.L.J. 358, A.I.R. 1929 All. 238 (239), 116 I.C. 445.

Immoveable property:—See Notes 17 and 18 under sec. 3.

Moveable property:—This section is restricted to immoveable property (25 Bom. 202, at p. 209) and has no application to *moveables*. In India there is no statutory provision restraining the fraudulent transfer of moveable property, but the general principle of justice, equity and good conscience as enunciated in this section may be extended to cases relating to transfer of moveable property—*Chidambara v. Sami Aiyar*, 30 Mad. 6 (9); *Kunhu v. Raru Nair*, 46 Mad. 478 (481); *Ah Foon v. Hoe Lai*, 9 Rang. 614, A.I.R. 1932 Rang. 13.

256. Intent to defeat or delay creditors:—The word “intent” implies “aim” and thus connotes not a casual or merely possible result but rather connotes the one object for which the effort is made, and thus has reference to what has been called the *dominant* motive, without which the action would not have been taken—*Bhagwant v. Kedari*, 25 Bom. 202 (226).

If the intention of the vendors was to put their property beyond the reach of creditors by converting it from land to cash (which can easily be concealed) it would bring the case within sec. 53, because that is the

most obvious and effective method of defeating and delaying creditors—*Palamalai v. S. I. Export Co.*, 33 Mad. 334 (336). But the mere fact that a transfer was made to defeat an anticipated execution is not a good reason for holding that the intent was to defeat or delay the creditors of the transferor, if there is other property left to meet the claim of the creditors—*Bhagwant v. Kedari*, 25 Bom. 202 (224). So also, the mere fact that three decrees were outstanding against the transferor when he made a gift of his property to his son and grandson, would not lead to the inference that the gift was intended to defeat the execution of the decrees, unless it was proved that after the gift the transferor had no other property left to satisfy the decrees—*Jwala Sing v. Fatta*, 19 A.L.J. 87, 60 I.C. 825. But a transfer of *all* the properties of the transferor, soon after a decree has been passed against him, must be deemed to have been made with the intention of defeating the creditors—*Natha v. Dhunbaiji*, 23 Bom. 1 (11). Where a husband executed a *hiba-bil-ewaz* in favour of his wife in lieu of dower, conveying all his moveable and immoveable properties including the household effects, and it appeared that the couple had been married for 15 years and no explanation was forthcoming as to why the donor thought of making the gift just at the time when a suit had been instituted against him by one of his creditors; and it was also found that no physical possession of the property had been conveyed to the donee, *held* that the gift was made with the object of defrauding creditors—*Amina v. Sheo Prasad*, 8 O.W.N. 794, 134 I.C. 415, A.I.R. 1931 Oudh 344. Where during the pendency of a suit the defendant applied for an adjournment, and during the adjournment conveyed all his properties, some of them at half their value, and it was found that the money obtained by the sale was utilised for paying off the whole of a debt for which he was only jointly responsible with two other persons and a debt for which no demand of payment had been made, *held* that the intention was to defeat and delay the creditors—*Chettyar Firm v. Ma Sein*, 5 Rang. 588, A.I.R. 1928 Rang. 1 (3), 105 I.C. 582. Where the object of the transferor and his transferee clearly was to defraud the creditor, the mere fact that the debt due to the creditor was eventually satisfied in its entirety out of the property left by the transferor did not make any difference; because the test to be applied in such cases is whether *at the time* the transaction sought to be impeached was entered into the intention of the parties to that transaction was to defraud or defeat the payment of debts—*Amina Bibi v. Saiyed Yusuf*, 20 A.L.J. 731, 44 All. 748, A.I.R. 1922 All. 449 (454). [This portion of the judgment is not to be found in 44 All. 748]. If there is a clear finding that a sale by a debtor was made in order to defeat the creditor's claim, it is immaterial and unnecessary to consider that the debtor had other properties sufficient to satisfy the creditor's claim—*Meenakshi v. Ammani*, A.I.R. 1927 Mad. 657 (659), 101 I.C. 610, 38 M.L.T. 369; and the case would be stronger for the application of this section, if the other properties of the debtor are not easily available for satisfaction of the creditor's decree—*Gopi Chand v. Jodhraj* A.I.R. 1929 All. 458, 116 I.C. 815. Where during the pendency of execution proceedings consequent on a mortgage-decree a judgment-debtor sells his property and pays the decretal amount into Court for the satisfaction of the decree-holder, no question of intent to defraud arises, and the transfer is perfectly valid—*Kanchan Mandar v. Kamala Prosad*, 21 C.L.J. 441, 29 I.C. 734. But where a judgment-debtor, soon after a money-decree had been passed against him, sold away his houses and lands without any intention of paying the judgment-

creditors, *held* that the sale was voidable under this section, and the mere fact that he subsequently paid some money to some creditors through fear of arrest did not make any difference—*Palamalai v. S. I. Export Co.*, 33 Mad. 334 (337). Where a part of the money obtained by the transferor under a conveyance was applied for the discharge of some of his debts, another part was paid to a person who was not his creditor, and the rest was kept by the transferor himself although there were other creditors, *held* that the transaction was intended to defeat these creditors and was voidable under this section—*Chidambaram v. Sami Aiyar*, 30 Mad. 6 (9).

The burden lies on the creditor to show that the transfer was intended to defeat or delay his claim, or at least that his claim against the transferor had been defeated or delayed by the transfer—*Md. Ishaq v. Md. Yusuf*, 8 Lah. 544, 101 I.C. 172, A.I.R. 1927 Lah. 420; *Fakira v. Majho*, 2 P.L.J. 546 (548).

257. Creditors:—The term ‘creditor’ in this section does not necessarily mean a *judgment-creditor*. Any creditor can sue under this section to set aside a deed executed by his debtor by which he (the creditor) is defrauded, defeated or delayed, although he has not obtained a decree on the debt by which he claims to be a creditor—*Ishwar Timmappa v. Devar Venkappa*, 27 Bom. 146; *Chinamal v. Gul Ahmad*, A.I.R. 1923 Lah. 478, 73 I.C. 719; *Faiz Ali v. Harkuar*, A.I.R. 1923 Nag. 334; *Gamu v. Nathu*, A.I.R. 1926 Nag. 494; *Reese River Silver Mining Co. v. Atwell*, (1869) L.R. 7 Eq. 347.

But the term ‘creditor’ *includes* a decree-holder, whether he has or has not applied for execution of his decree. See the 4th para of subsection (1).

The rule of this section is not applicable to mortgagees as such, whose debts being secured upon their debtor’s property cannot be defeated out of their right by any subsequent alienation fraudulent or otherwise—*Stephens v. Olive*, 2 Br. C.C. 90; *Kanchan v. Baijnath*, 19 Cal. 336. But where the property mortgaged is not sufficient to satisfy the mortgage-debt and the debtor is personally liable, the mortgagee will be a creditor for the balance—*Harman v. Richards*, 10 Hare 81. If the mortgagee relinquishes his security for the debt or if it for any reason goes off, he will then rank as a simple creditor and will be entitled to the protection under the section—*Lister v. Turner*, 5 Hare 281.

A landlord is a creditor in respect of the rents due from his tenant—*Nogendra v. Satadal*, 26 Cal. 536. A Hindu wife who has got a claim for past maintenance is a creditor of her husband, although she has not obtained a decree for maintenance—*Meenakshi v. Ammani*, A.I.R. 1927 Mad. 657 (658), 101 I.C. 610.

A creditor whose claim has become barred by limitation ceases to be a creditor and cannot sue under this section to set aside a fraudulent conveyance. See *Burjorji v. Dhanbai*, 16 Bom. 1 (17).

Although the word “creditors” is used in the plural number, still this section applies with equal force and effect if a debtor transfers his property with the intention of defeating one *single* creditor amongst a number of creditors. This section is not limited in its application to cases where there is an intention to defeat the *general body* of creditors—*Fakir v. Majho*, 2 P.L.J. 546 (550), following *In re Moronay*, L.R. 21 Ir. 27; *Ishan Chandra v. Bishu Sardar*, 24 Cal. 825 (827).

The burden lies on the creditor to show that he was a creditor *at the time* of the transfer; *i.e.*, he lent money before the transfer sought to be impeached took place—*Md. Ishaq v. Md. Yusuf*, 8 Lah. 544, A.I.R. 1927 Lah. 420 (421), 101 I.C. 172.

Subsequent creditors:—The benefit of this section is not restricted to existing creditors alone; a fraudulent transfer may equally be impeached by subsequent creditors as well as by those existing at the time it was made—*Hooseinbhai v. Haji Esmail*, 5 Bom.L.R. 255; *Thomas Pillay v. Muthuraman*, 33 Mad. 205; *Ram Chand v. Mathura Chand*, 19 A.L.J. 299, 60 I.C. 896; *Narasimham v. Narayana*, 22 L.W. 592, 92 I.C. 405, A.I.R. 1926 Mad. 66 (68); *Meenakshi v. Ammani*, 101 I.C. 610 A.I.R. 1927 Mad. 657; *Parkash Narain v. Birendra*, 7 Luck. 131, 132 I.C. 51, A.I.R. 1931 Oudh 333; *Zahir Ahmad v. Debi Dayal*, 6 Luck. 397, 129 I.C. 333, A.I.R. 1931 Oudh 134. It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement; for if a man does it with a view to being indebted at a *future* time, it is equally fraudulent and ought to be set aside—*per* Lord Hardwick in *Stileman v. Ashdown*, 2 Atk. 481. So, where a transfer was executed at a time when the executant was well aware of the probability of a decree for a substantial sum being passed against him, this section would apply, although the transferor had no present debts at the time the transfer took place—*Manraj Agarwala v. Ahammad*, 47 I.C. 932 (Cal.); *Rajagopala v. Sivagami*, 20 L.W. 538, A.I.R. 1924 Mad. 779, 82 I.C. 945. Similarly, “a man is not entitled to go into a hazardous business, and immediately before doing so, to settle all his property voluntarily; the object being ‘If I succeed in business I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss.’ This is the very thing which the statute was meant to prevent.”—*per* Jessel M. R. in *Ex parte Russel*, 14 Ch. D. 588; *Mohammad Ali v. Bismillah*, 7 O.W.N. 821 (P.C.), 35 C.W.N. 324 (329), A.I.R. 1930 P.C. 255, 128 I.C. 647; *Shantilal v. Munshi Lal*, 56 Bom. 595, 34 Bom.L.R. 862, A.I.R. 1932 Bom. 498 (504). “A man who contemplates going into trade cannot on the eve of doing so take the bulk of his property out of reach of those who may become his creditors in his trading operation.”—*per* Malins V. C. in *Mackay v. Douglas*, L.R. 14 Eq. 106; see also *Freeman v. Pope*, L.R. 5 Ch. 538.

But cases in which persons of extravagant habits make settlements of the whole of their property in favour of their son or wife, with the purpose of protecting the property against the consequences of their own improvidence, stand on a different footing. Such conveyances are well-known in English law, and Courts in India have also given effect to such voluntary conveyances. In such cases, when the settlor was *not in debt at the time* but subsequently contracted debts, the creditors have not been permitted to avoid the settlement; because it was made with the intention of saving the property from the settlor's own improvidence and not with the intention of defeating the creditors. When there was no indebtedness at the time of the settlement, no *mala fides* can be presumed merely from the possibility that it might prejudice the claim of subsequent creditors—*Sadashiv v. Trimbak*, 23 Bom. 146 (156, 157). No question of consideration arises in such case. In fact, the consideration is natural love and affection—*Ibid.* Thus, a certain person who was leading a life of dissipation transferred all his property to his wife, so that he might not be at liberty to live lavishly as before. But even after

the execution of the deed, he drifted into his old bad way of life and began to contract debts. In a suit by a creditor impeaching the transfer, it was held that there having been no indebtedness of the transferor *at the time* when he executed the deed of assignment to his wife, and the consideration for the same being natural love and affection which the law regarded as good, *no mala fides* could be presumed merely from the possibility that the settlement might prejudice the claims of subsequent creditors—*Ebrahimbai v. Fulbai*, 26 Bom. 577 (585). See also *Md. Ishaq v. Md. Yusuf*, 8 Lah. 544, 101 I.C. 172, A.I.R. 1927 Lah. 420 (421).

In the case of subsequent creditors, *i.e.*, where there are no debts due at the time and the transferor runs into indebtedness subsequently, the presumption will be regulated by the peculiar circumstances of each particular case. If, for instance, the transfer was made to ward off the effects of a threatened litigation or in anticipation of the transferor embarking upon a commercial venture or on the eve of his going into trade, the intent to defeat or delay future creditors will be presumed. But in other circumstances the transaction will be presumed to be *bona fide*, and it will lie on the future creditors to prove that the transfer was made with intent to defeat or delay the creditors—*Md. Ishaq v. Md. Yusuf*, 8 Lah. 544, 101 I.C. 172, A.I.R. 1927 Lah. 420 (421). Where a person executes a deed of *wakf* or gift in favour of his son and it is found that all his existing creditors at that time are fully paid off, this fact affords a very strong evidence negating the intention to defraud creditors, and a subsequent creditor cannot bring a suit to set aside the transfer—*Zahir Ahmad v. Debi Dayal*, 6 Luck. 397, 7 O.W.N. 1115, A.I.R. 1931 Oudh 134 (135); See also *Shantilal v. Munshilal*, 56 Bom. 595, 139 I.C. 820, A.I.R. 1932 Bom. 498 (504). In the absence of any express intention to defraud, a voluntary deed cannot be set aside at the instance of a creditor whose debt comes into existence after its date, if all the creditors existing at the time have been paid off—*In re Kelleher*, [1911] 2 Ir. R. 1. “Where the settlor was not indebted at the time, the onus of proving the fraud is thrown on those who impeach the settlement, for fraud is not to be presumed. The mere fact of subsequent indebtedness is not evidence of a fraudulent intent against subsequent creditors”—May’s *Fraudulent Conveyances*.

258. ‘Voidable’:—Section 53 does not render a transaction *void ab initio*, but only voidable, and that only at the option of any person defeated, defrauded or delayed—*Krishna Kumar v. Joykrishna*, 23 C.L.J. 570, 29 I.C. 690; *Rangnath v. Govind*, 28 Bom. 639; *Krishna Bai v. Debi Singh*, 71 I.C. 409, A.I.R. 1923 Nag. 195. If the transferee pays off the debt due to the creditor, the latter cannot complain that he is defeated or defrauded by the transfer and so cannot avoid it—*Krishna Bai v. Debi Singh*, (*supra*).

The creditor has the election of either accepting the transaction or of avoiding it; and he may do so expressly or by implication. If he affirms the transaction expressly or does any act which amounts to an affirmation of the transaction, he loses his right of avoiding it afterwards. Once he has decided to do one thing, he loses his other option, and cannot be allowed to reprobate what he has approbated—*Sachitanand v. Radhapat*, 26 A.L.J. 524, A.I.R. 1928 All. 234 (235), 116 I.C. 86.

259. Whether ‘suit’ by creditor is necessary:—Under this section the avoidance by a creditor of a fraudulent transfer by the debtor need not be by a *suit*, brought on behalf of all the creditors or even by that one

creditor; an open and unequivocal declaration of the intention to avoid it expressed by a creditor is sufficient in law to enable him to treat it as void and to take steps on that footing to enforce his rights as a creditor for obtaining satisfaction of his debt. Thus, where a creditor after coming to know of a prior fraudulent transfer by the debtor, made a subsequent purchase of one of the lands included in the prior transfer, ignoring the prior transfer and treating it as if it conveyed no title to the prior transferee so far as the land purchased by himself was concerned, *held* that there was a sufficiently unequivocal expression of an intention by the creditor to avoid the prior transfer to the extent to which it was necessary to give effect to his own purchase. The methods of avoidance are not restricted to proceedings against the property through attachment and sale for the purpose of recovering the debt. This section does not preclude recovery by means of any other reasonable transaction, through which, without incurring the expenses of litigation the creditor could make available the value of the property to satisfy his debt—*Sami Asari v. Adinam*, 12 L.W. 718, 61 I.C. 580 (582, 583).

Where a creditor attaches in execution the property transferred by the debtor, that is sufficient exercise of the option by the creditor to avoid the transaction—*Nauratan v. Margaret Stephen*, 3 P.L.T. 613, 68 I.C. 369, A.I.R. 1922 Pat. 572.

Defence by creditor in a suit by transferee:—If a creditor wants to avoid a fraudulent conveyance made by his debtor, he can do so not only by a properly instituted suit, but also by way of *defence* to a suit brought by the transferee. A suit to set aside the fraudulent transaction is not the only remedy; section 53 of the Transfer of Property Act can be pleaded as a *defence*—*Ramaswami v. Mallappa*, 43 Mad. 760 (F.B.), 39 M.L.J. 350, 59 I.C. 947 (overruling *Palaniyani v. Appavu*, 30 M.L.J. 565; *Subrahmaniam v. Muthia Chettiar*, 41 Mad. 612 (F.B.); and *Muthukumara v. Alagappa*, 6 L.W. 518); *Cheruthazhath Abdulla Haji v. Cheriyaandi*, 50 I.C. 959 (*per* Seshagiri Aiyar J.); *Abdul Kadir v. Ali Mia*, 16 C.W.N. 717, 14 I.C. 715; *Dhansukhdas v. Jhango*, 16 N.L.R. 3; *Ram Chand v. Mathura Chand*, 19 A.L.J. 299, 60 I.C. 896. See also *Seth Ghansham Das v. Uma Pershad*, 23 C.W.N. 817 (P.C.), 50 I.C. 264 in which the Judicial Committee allowed the creditor to raise in *defence* the plea that the plaintiff's mortgage was executed collusively as a device to defeat the creditors.

261. Protection of transferee in good faith:—See second para of sub-section (1). This was the third para of the old section, and was intended to apply to both cases where the transfer was made with intent to defeat *creditors* and where it was made with intent to defraud *subsequent transferees*. But it has been pointed out by the *Special Committee* that “this para can hardly apply where there is a contest between a prior voluntary (gratuitous) transfer and a subsequent transfer for consideration.” For this reason this para has been included only in sub-section (1) of the new section.

This para protects a *bona fide* purchaser for valuable consideration, whether he purchases from the original fraudulent transferor or from a transferee from him—*Kunhu Pothanassiar v. Raru Nair*, 46 Mad. 478, 44 M.L.J. 527, A.I.R. 1923 Mad. 558; *Shikar Chand v. Jagmandar*, 25 A.L.J. 873, 106 I.C. 519, A.I.R. 1928 All. 29 (32). A fraudulent grantee takes the entire estate of the fraudulent grantor, and a *bona fide* purchaser

from the fraudulent grantee takes the entire estate, even though the deed is voidable at the instance of the creditors of the original grantor—*Shikar Chand*, supra. But where the original transfer was supported by no consideration, and devised by the parties to defeat the creditors of the transferor (and was therefore not merely *voidable* but *void*) and the property was afterwards assigned for value to an innocent purchaser, *held* that this last mentioned person was not protected by this para; since his assignor had acquired no interest in the property under the void transfer, he had no title to convey to his transferee, although this person was a transferee in good faith—*Basti Begam v. Benarsi Prasad*, 30 All. 297 (308), explained in *Shikar Chand's case*, supra.

This clause lays down that when the consideration for the transfer and good faith on the transferee's part are present, the intention of the transferor to defeat or delay his creditors is immaterial. Shephard and Brown, 7th Edn., pp. 160-161.

The meaning of this para is that where a person acquires any property for value and in good faith, that is, without being a party to any design on the part of the transferor to defraud his creditors, his right shall not be impaired by anything contained in this section, notwithstanding that the transferor may be actuated by such desire—*Ishan Chunder v. Bishu Sardar*, 24 Cal. 825 (827, 828). A mere fraudulent intention on the part of the grantor alone will not invalidate the transfer, if it is for valuable consideration and there is no want of good faith on the part of the grantee—*Hakim Lal v. Mooshahar Sahu*, 34 Cal. 999 (1017); *Gopal v. Bank of Madras*, 16 Mad. 397; *Bhagwant v. Kedari*, 25 Bom. 202 (224). The knowledge and intention of the *transferee* are the determining factors in such a case. If he buys in good faith and for valuable consideration, his purchase cannot be set aside by reason of the transferor having sold the property for the express purpose of defeating or delaying the creditors. It is a question of fact in each case whether the transferee purchased in good faith without knowledge of the transferor's fraudulent intention—*Ibrahim v. Jiwan Das*, A.I.R. 1924 Lah. 707 (709), 75 I.C. 1043; *Daulat Ram v. Ghulam Fatima*, 89 I.C. 953, A.I.R. 1926 Lah. 25.

A deed cannot be said to have been executed in good faith, when it was executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the benefit to himself—*Ramasamia v. Adinarayana*, 20 Mad. 465 (466); *Natha v. Maganchand*, 27 Bom. 322 (327); *Ex parte Games*, (1879) 12 Ch. D. 314.

If the property of the debtor is transferred for consideration to a *bona fide* purchaser, then even though such transfer has the effect of putting the debtor's property out of the reach of the creditors, the transfer will nevertheless be effective and the creditors will not be entitled to have the transfer set aside or declared void—*Fakira Singh v. Majho Singh*, 2 P.L.J. 546 (550, 551), 40 I.C. 685. The transaction may defeat or delay; the transferor may intend that it should; the transferee may know that it will; the consideration may be inadequate; and yet unless the transferee himself has been wanting in good faith, his rights will not be impaired—*Bhagwant v. Kedari*, 25 Bom. 202 (226). Even where consideration has been paid, and possession delivered to the transferee, the transfer will not affect the rights of the creditor, if the transferor's intention was to defeat or delay him. But so far as the *transferee* is concerned it must be found that he participated in the intention of the transferor to defeat or delay the creditor.

If the transferee had no notice of and *did not share in the fraudulent intention*, the transfer will not be set aside—*Pandurang v. Bapuji*, 71 I.C. 28, A.I.R. 1923 Nag. 103. The definition of constructive notice given in sec. 3 should not be imported into this section. So, the *mere knowledge* on the part of the transferee of an impending execution of a decree against the transferor is not sufficient to make the transferee a transferee otherwise than in good faith, when he *does not share the intention* of the transferor to defeat or delay his creditors nor participates in the commission of the fraud—*Ishan Chunder v. Bishu Sardar*, 24 Cal. 825 (828, 830); *Raizat v. Ali Bandi*, 7 O.L.J. 699, 60 I.C. 725 (727); *Bakht Bali v. Lekhrani*, 15 I.C. 509 (510); *Ah Foon v. Hoe Lai*, 9 Rang. 614, A.I.R. 1932 Rang. 13 (14). The mere knowledge on the part of the purchaser that the sale may defeat or delay the creditors is not sufficient to negative the *bonafides* of the purchaser—*Kamini Kumar v. Hira Lal*, 23 C.W.N. 769, 51 I.C. 736; *Bhagwant v. Kedari*, 25 Bom. 202 (213).

When the circumstances raise a presumption of fraud, the burden lies on the transferee to prove good faith on his part and consideration—*Amarchand v. Gokul*, 5 Bom.L.R. 142; *Palamalai v. S. I. Export Co.*, 33 Mad. 334 (338); *R. M. A. M. Firm v. Maung San*, 6 Bur.L.J. 145, A.I.R. 1927 Rang. 331 (332), 104 I.C. 557.

A transferee who knows the extravagant and reckless character of the transferors ought to inquire whether they are transferring the property with the intention of defeating their creditors; but the absence of such inquiry, especially when the transferee is not aware of any debts of the transferors, cannot be called *mala fide*—*Natha v. Dhunbaiji*, 23 Bom. 1 (14). So also, it is not the duty of the purchaser to see to the application of the purchase-money—*Deoki Nandan v. Saiyed Jawad Hussain*, A.I.R. 1928 Pat. 199 (201), 106 I.C. 356.

Under this clause, *good faith is more essential than consideration*, so that if the element of good faith is not present, the transaction will be avoided even where there is some consideration—*Narmal Das v. Chet Ram*, 11 O.C. 197; *Sundar Singh v. Ram Nath*, 7 Lah. 12, A.I.R. 1926 Lah. 167 (168), 27 P.L.R. 219, 93 I.C. 1013. It is not sufficient to render a deed valid that it should be made upon good consideration; it must also be proved that it was made in good faith; for (as Lord Coke observed in *Twyne's case*) "a good consideration doth not suffice, if it be not also *bona fide*"—*Chidambaram v. Sami Aiyar*, 30 Mad. 6 (9); *Kamini Kumar v. Hiralal*, 23 C.W.N. 769, 51 I.C. 736; *Hakim Lal v. Mooshahar*, 34 Cal. 999 (1008, 1013); *Viswananda v. Raja Venkata*, A.I.R. 1927 Mad. 278 (280), 25 L.W. 223, 99 I.C. 709; *Madan Gopal v. Lahri Mal*, 12 Lah. 194, 130 I.C. 62, A.I.R. 1930 Lah. 1027 (1028). Under this section, the Court has not only to determine whether there was consideration, but has also to consider whether the purchaser was a transferee in good faith, *i.e.*, whether or not the transferee combined with the transferor in carrying out the improper purpose of defeating the creditors—*Hamidunnissa v. Nazirunnissa*, 31 All. 170 (172). So, if the *transferee shares with the transferor the intention* of defeating the creditors of the latter, the transfer will be voidable at the option of the creditors, even though there is some consideration—*Bhikhabai v. Panchand*, 43 Bom. 707 (714), 52 I.C. 682. In ordinary circumstances, if it is proved that there was a valuable consideration adequate to the occasion, the Court will be slow to hold that there was no good faith (5 Bom.L.R. 142); but if the circumstances indicate that the

transferee knew that the vendors were selling the property for the purpose of defeating and delaying their creditors, and that the transferee assisted the vendors in that purpose, *held* that he could not be deemed to be a transferee in good faith although he paid good consideration—*Palamalai v. S. I. Export Co.*, 33 Mad. 334 (338); *Chidambaram v. Sami Aiyar*, 30 Mad. 6 (10); *Ishan Chunder v. Bishu Sardar*, 24 Cal. 825; *Ah Foon v. Hoe Lai*, 9 Rang. 614, A.I.R. 1932 Rang. 13 (14). Where the transferor acted throughout in bad faith and with the object of defeating, delaying and obstructing his creditor, and it was further found that not only was the transferor acting in fraud of his creditor but that the transferee also had knowledge of the fact and aided and abetted him in doing so, and that though there was some consideration, a substantial portion of the consideration was fictitious, *held* that the whole transaction must be treated as fraudulent and effected with the object of defeating the creditor—*Mulu Ram v. Jiwandra Ram*, 4 Lah. 211 (213, 214), 72 I.C. 452, A.I.R. 1923 Lah. 423.

Thus, if a debtor with the purpose of cheating his creditors converts his lands into money, because money is more easily shuffled out of sight than land, he of course commits a gross fraud; and if his object in making the sale is known to the purchaser, and he nevertheless *aids and assists* in executing it, his title is worthless as against creditors, though he may have *paid the full price*—*per* Black, C.J. in *Covanhawan v. Hart*, 60 Am. Dec. 57, cited in 34 Cal. 999 (1014); *Alagappa v. Dasappa*, 24 M.L.J. 293, 18 I.C. 332; *Palamalai v. South Indian Export Co.*, 33 Mad. 334 (336); *Kamini Kumar v. Heera Lal*, 23 C.W.N. 769, 51 I.C. 736; *Aftabuddin v. Basanta Kumar*, 22 C.W.N. 427; *Ishan Chunder v. Bishu Sardar*, 24 Cal. 825 (828); and such a transfer cannot be held to be valid on the ground that a portion of the consideration-money was applied by the transferor in payment of some debts which he owed to third persons—*Aftabuddin v. Basanta Kumar*, (*supra*). A gift of property by a person under embarrassed circumstances to his wife and so to make provision for their maintenance cannot be held to be *bona fide*, because although the donor is bound to maintain his wife and minor son, still such obligation is a personal obligation, and the payment of debts takes precedence over a right of maintenance—*Sundar Singh v. Ram Nath*, 1 Lah. 12, A.I.R. 1926 Lah. 167 (168), 93 I.C. 1013.

When the transferee is a *creditor* of the transferor, and accepts the transfer in satisfaction of the debt due to him, though *with the knowledge* that his doing so has the effect of defeating other creditors of the transferor, the transfer will still be considered as made in good faith and within the protection of this clause—*Ishan Chunder v. Bishu Sardar*, 24 Cal. 825 (829); *Rajani v. Gour*, 35 Cal. 1051 (1058).

Notice:—Where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith within the meaning of this section. Even though his instrument may be registered, still his status will be affected by his own *mala fides*—*Ram Autar v. Dhanauri*, 8 All. 540 (542).

262. Consideration:—The term 'consideration' in the 2nd para of sub-section (2) means valuable consideration, for if the consideration is inadequate, the presumption may arise that the transferee did not act in good faith.

"Valuable consideration means some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other"—*per* Lush, J. in *Currie v. Misa*, L.R. 10 Ex. 153 (162), cited in *Mahammadunnissa v. Bachelor*, 29 Bom. 428 (433). A time-barred debt forms no consideration for a transfer—*Rangilbhai v. Vinayak*, 11 Bom. 666 (674, 677); *Narayana v. Viraraghava*, 23 Mad. 184 (189). Where a Muhammadan relinquished his share in the family property in order to facilitate the appointment of the Collector as guardian of the minor nephew of the surrenderer, *held* that the relinquishment was not a gratuitous gift unsupported by consideration. The consideration of the relinquishment was the Collector's undertaking the guardianship of the minor and the responsibility of taking charge of the minor's property—*Mahammadunnissa v. Bachelor*, *supra*.

If it is proved that the transferee paid what was the full value of the property transferred to him, the Court will lean towards holding that the transferee acted *bona fide* in the transaction—*Ah Foon v. Hoe Lai*, 9 Rang. 614, A.I.R. 1932 Rang. 13 (15), 135 I.C. 641. Where the greater part of the consideration has been paid, the fact that a small portion of it is still due to the vendor is not sufficient to vitiate the sale for want of consideration—*Natha v. Magan Chand*, 27 Bom. 322 (328). If the consideration was not grossly inadequate, the mere fact that full consideration was not paid would not be a ground for holding that the transaction was fraudulent—*Deokinandan v. Jawad Hussain*, A.I.R. 1928 Pat. 199 (201), 106 I.C. 356.

If the transfer was made for a grossly inadequate consideration, the presumption may arise that the transfer was fraudulent and that the transferee did not act in good faith. But this presumption holds good in case of a sale, but not in case of a mortgage, for with regard to a mortgage it cannot be said that consideration is grossly inadequate, seeing that a mortgage can be for any amount regardless of the value of the property—*Banwari v. Bhag Mal*, 12 Lah. L.J. 107, A.I.R. 1931 Lah. 213.

Partial consideration:—Where a portion of the consideration for a mortgage is fictitious, the whole instrument ought not to be considered fictitious; it must be upheld to the extent to which it is supported by consideration—*China Pitchia v. Pedukotiah*, 36 Mad. 29 (30), 11 I.C. 868. Where only a small part of the consideration is a barred debt, it cannot be held on that account that there was no consideration and that the deed is void *in toto*. It is valid to the extent of the consideration which is valid—*Natha v. Magan Chand*, 27 Bom. 322 (328). Where the considerations for a mortgage are separable, part being valuable, and part fictitious for the purpose of defeating or delaying the creditors, the transfer is valid and enforceable with regard to the part which is for valuable consideration, and is inoperative so far as the consideration is fictitious. Thus, a mortgage was executed for a total sum of Rs. 8,500. It was found that Rs. 4,853 was actually advanced by the mortgagee and the evidence as to the balance Rs. 3,647 was extremely suspicious and seemed to be for the purpose of delaying another creditor who had obtained a decree on a *hatchita*; *held* that there ought to be a mortgage-decree on the footing of Rs. 4,853, being the principal money secured—*Rajani Kumar v. Gourkishore*, 35 Cal. 1051 (1057, 1058); *Loorthi v. Gopalasami*, 46 M.L.J. 125, A.I.R. 1924 Mad. 450 (453), 80 I.C. 147. But in some other cases

it has been held that the two parts of such a single transaction are not separable and ought not to be separated; therefore the transfer in fraud of creditors which is partly supported by consideration is *wholly* void, and is not good to the extent to which consideration passed—*Sama Row v. Doraisami*, 24 M.L.J. 266 (269), 18 I.C. 768 (dissenting from 35 Cal. 105); *Chidambaram v. Sami Aiyar*, 30 Mad. 6 (11); *Visvananda v. Raja Venkata*, 1927 M.W.N. 1, 25 L.W. 223, 99 I.C. 709, A.I.R. 1927 Mad. 278 (280) (dissenting from 36 Mad. 29); *Bhikhabhai v. Panchand*, 43 Bom. 707 (715), 21 Bom.L.R. 770, 25 I.C. 682; *Madan Gopal v. Lahri*, 12 Lah. 194, A.I.R. 1930 Lah. 1027 (1029). See also *Narayana v. Viraraghavan*, 23 Mad. 184, in which part of consideration was fictitious, but the transfer was held to be void *in toto*.

If however, a portion of the consideration has been applied in paying off a *mortgage-debt* of the transferor, the transfer is valid to that extent. The principle is that when a transfer of immoveable property is set aside on the ground that it was intended to defeat or delay the creditors, the transferee is entitled to get credit only for the *mortgage-debt* binding on the property that he may have discharged as part of the consideration for the transfer, *but not for the money-debts* of the transferor discharged by him—*Gangama v. Veerappa*, A.I.R. 1931 Mad. 513 (520), 131 I.C. 833.

Dower:—A dower-debt due by the wife from her husband is a valuable consideration; consequently a transfer of property by the husband to the wife in satisfaction of her dower-debt is a perfectly legitimate transaction, and no Court has any power to disturb it—*Suba Bibi v. Balgovind*, 8 All. 178; *Bibi Saira v. Bibi Saliman*, 2 P.L.T. 577, 63 I.C. 111 (113); *Mahadeo Lal v. Bibi Maniran*, 12 Pat. 297, 145 I.C. 213, A.I.R. 1933 Pat. 281 (283). If there is a real dower-debt due to the wife, equal to or exceeding the value of the property transferred, the transfer cannot be impeached if it is a genuine transfer and the transferor reserves no benefit for himself—*Mahadeo Lal v. Bibi Maniran*, *supra*. A gift by a Muhammadan husband of a portion of his property to his wife could not be impeached under this section, when it was found that part of the wife's dower-debt was still due and it was further shown that the husband still retained in his possession other immoveable property to meet the claims of his creditors—*Amina Bibi v. Md. Ibrahim*, 4 Luck. 343, 114 I.C. 504, A.I.R. 1929 Oudh 520 (521); *Umrao Singh v. Kaniz Fatima*, 1901 A.W.N. 67.

Permission to marry a second time:—In a Madras case, permission to marry a second time has been held to be a good consideration. A transfer of all the properties of a person in favour of his children by his first wife at a time when he was about to marry a second wife, and in consideration of his being permitted to do so by the relatives of his first wife is not a transfer in fraud of creditors and is not voidable, even though the transferor was heavily indebted at the time—*Kapini Goundan v. Sarangapani*, 3 L.W. 287, 34 I.C. 744 (745).

263. Preference of one or some creditors:—Para 3 of sub-section (1), which has been newly added, lays down that nothing contained therein shall affect the law of insolvency. The *Special Committee* remarks:—

“To make sub-section (1) more comprehensive we have provided, as is done in section 172 of the English Law of Property Act, 1925, that

nothing contained in sub-section (1) shall affect the law of insolvency for the time being in force. Thus, a voluntary transfer, though it may be good under sub-section (1), may be avoided in insolvency proceedings under the circumstances mentioned in section 55 of the Presidency-towns Insolvency Act, 1909, and section 53 of the Provincial Insolvency Act, 1920. Similarly, a transfer is not necessarily void under sub-section (1) because it amounts to an assignment of all the transferor's property for the benefit of a particular creditor or of particular creditors (*Alton v. Harrison*, 1869, L.R. 4 Ch. 622, 626), but it may operate as an act of insolvency under section 9 of the Presidency-towns Insolvency Act and section 6 of the Provincial Insolvency Act, or it may be void as amounting to a fraudulent preference within the meaning of section 56 of the Presidency-towns Insolvency Act and section 54 of the Provincial Insolvency Act."

It is a well-known principle of English law, which has been consistently followed in India, that except in cases falling under the law relating to insolvency, a conveyance is not voidable because it secures a preference to one creditor or some of the creditors, to the exclusion of the others. Sec. 53 renders void only those transfers which are made for the purpose of defeating *all* the creditors of the transferor to the benefit of the debtor, but it does not render void a transfer which is made merely for the purpose of preferring *one* creditor to another. Thus, a debtor purported to convey his properties for adequate consideration for the purpose of *paying off some only of his creditors*, and it was proved that the debts were genuine debts and were in fact discharged out of the consideration for the conveyance, and the consideration for the deed represented the value of the properties transferred; *held* that the transfer was not voidable at the instance of the other creditors—*Hakim Lal v. Mooshahar*, 34 Cal. 999 (1019), affirmed by the Privy Council in *Musahar v. Hakim Lal*, 43 Cal. 521. A preference of one creditor to the detriment of another is no ground for impeaching the deed, even if the debtor was intending to defeat an anticipated execution by another creditor. In a case in which no consideration of the law of Bankruptcy applies, there is nothing to prevent the debtor paying one creditor in full and leaving others unpaid, although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. But the debtor must not retain a benefit for himself—*Musahar v. Hakim Lal*, 43 Cal. 521 (P.C.); *Muthia Chetty v. Palaniappa*, 51 Mad. 349 (P.C.), 109 I.C. 626, A.I.R. 1928 P.C. 139; *Ma Pwa May v. Chettiar Firm*, 7 Rang. 624 (P.C.), 34 C.W.N. 6 (10), A.I.R. 1929 P.C. 279, 120 I.C. 645. The mere fact that one creditor is preferred to another does not in itself render the transaction in favour of the preferred creditor voidable under this section, if the debtor reserves no benefit to himself. A debtor, for all that is contained in sec. 53 T. P. Act, may pay his debts in any order he pleases, and may pay any creditor he chooses—*Rani Mina Kumari v. Bijoy Singh*, 44 Cal. 662 (P.C.); *Palamalai v. South Indian Export Co.*, 33 Mad. 334 (337); *Muthia v. Palaniappa*, 45 Mad. 90, A.I.R. 1922 Mad. 447, 70 I.C. 432, 41 M.L.J. 594; *Kalu v. Randhir*, 21 O.C. 97, 46 I.C. 330 (331); *Amina Bibi v. Md. Ibrahim*, 4 Luck. 343, 114 I.C. 504, A.I.R. 1929 Oudh 520 (521); *Madan Gopal v. Lahri Mal*, 12 Lah. 194, 130 I.C. 62, A.I.R. 1930 Lah. 1027 (1028); *Uttamrao v. Gangaram*, 27 N.L.R. 382, A.I.R. 1932 Nag. 33. The meaning of the statute is that the debtor must

not retain a benefit for himself; it has no regard whatever to the question of preference or priority among the creditors of the debtor. A settlement which preferred certain creditors and intended to defeat others might be good under the statute—*Middleton v. Pollock*, (1876) 2 Ch. D. 104 (108), cited in 34 Cal. 999 (1010). In one sense it may be considered fraudulent for a man to prefer one of his creditors to the rest and give him a security which left his other creditors unprovided for; but that is not the sense in which the law understands the term 'fraudulent.' The law leaves it open to a debtor to make his own arrangements with his several creditors and to pay them in such order as he thinks proper—*per* Baron Ralf in *Eveleigh v. Purssord*, 2 M. & R. 541; *Rani Mina Kumari v. Bijoy Singh Dudhoria*, 44 Cal. 662 (P.C.).

So also, where a debtor conveyed his property to one of his creditors in satisfaction of the debt due to him, and the creditor knew that his taking the conveyance had the effect of defeating or delaying the other creditors, still the transfer would not be voidable under this section, if it is for good consideration and retains no benefit for the debtor—*Hakim Lal v. Mooshahar*, 34 Cal. 999 (1015); *Bhagwant v. Kedari*, 25 Bom. 202 (213); *Rajani v. Gaurkishore*, 35 Cal. 1051 (1058); *Motilal v. Utam*, 13 Bom. 434 (441); *Solema v. Hafez*, 54 Cal. 687, A.I.R. 1927 Cal. 836 (839); *Suba Bibi v. Balgobind*, 8 All. 178 (180); *Mukundi v. Bulaki*, 124 P.L.R. 1911, 9 I.C. 1037; *Bibi Saira v. Bibi Saliman*, 2 P.L.T. 577, 63 I.C. 111 (113). A debtor may make preference amongst his creditors even to the extent of transferring all his property to one creditor to the exclusion of the others. The object of sec. 53, T. P. Act is not equality of distribution of the property of the debtor among the creditors, as in the case of a Bankruptcy Act. Consequently a debtor may openly prefer a particular creditor to the rest, and may transfer property to him for the *bona fide* purpose of discharging his debt, and such transfer is not void against the preferred creditor. If there is no secret trust between the debtor and that creditor in favour of the former, but the sole object of the transfer is to pay or secure the payment of a debt, the transaction is a valid one—*Hakim Lal v. Mooshahar*, 34 Cal. 999 (1015, 1016); *Mushahar v. Hakim Lal*, 43 Cal. 521 (P.C.). A preferential transfer of property to one creditor cannot be declared fraudulent as to the other creditors although the debtor in making it intended to defeat their claims, and that creditor had knowledge of such intention. If the only purpose of the debtor is to pay off a debt to that creditor and the property is not worth materially more than the amount of the debt, the transaction is not fraudulent. If however, the transfer is not in reality a preference of an actual debt, but is a mere colourable device to place the debtor's property beyond the reach of his other creditors, or if the transaction extends beyond the necessary purpose of a mere preference, so as to secure some benefit or advance for the debtor himself or for some one in whom he is interested, or to unnecessarily hinder and delay other creditors, the transfer is fraudulent—*Hakim Lal v. Mooshahar Sahu*, 34 Cal. 999 (1018); *Chidambaram v. Sami Aiyar*, 30 Mad. 6 (11); *Loorthia v. Gopalasami*, 46 M.L.J. 125, 80 I.C. 147, A.I.R. 1924 Mad. 450 (453); *Nagarathna v. Chidambaram*, 1928 M.W.N. 617, A.I.R. 1928 Mad. 860 (864), 113 I.C. 129; *Labhu Ram v. Charnu*, 30 P.L.R. 306, 116 I.C. 317, A.I.R. 1929 Lah. 409 413; *Visvananda v. Raja Venkata*, 25 L.W. 223, A.I.R. 1927 Mad. 278, 99 I.C. 709. Thus, if a barred or irrecoverable debt is set up as part of the consideration

for the property transferred to the creditor, or if the value of the property transferred to the creditor is greatly in excess of the amount of the debt due to the creditor, it will be presumed that the transfer was made with intent to defeat the other creditors—*Rangilbhai v. Vinayak*, 11 Bom. 666 (674, 677); *Hanifa Bibi v. Punnamma*, 17 M.L.J. 11; *Narayana v. Viraraghava*, 23 Mad. 184 (189); see also *Loorthia v. Gopalasami*, *supra*.

The reason for the distinction between an ordinary transferee (who purchases for a present consideration) and a creditor-transferee (who purchases in satisfaction of pre-existing debt) is thus stated: "A person who purchases for a present consideration is in every sense a volunteer; he has nothing at stake, no self-interest to serve; he may with perfect safety keep out of the transaction. Having no motive or interest prompting him to enter into it, if yet he does enter, knowing the fraudulent purpose of the grantor, the law very properly says that he enters into it for the purpose of aiding that fraudulent purpose. But not so with him who takes the property in satisfaction of a pre-existing indebtedness; he has an interest to serve; he can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept a voluntary preference that he has to obtain a preference by superior diligence; he may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve; and if he goes no further than is necessary to serve that purpose the law will not charge him with fraud by reason of such knowledge."—*Lockrain v. Rastan*, 81 N.W. 60, 9 North Dakota 434, cited in 34 Cal. 999 (1018); *Chetty Firm v. Maung Po*, 7 Bur.L.T. 257, 23 I.C. 341.

264. Effect of fraud inter partes:—This question should be discussed in its two aspects: (a) where the fraud is inchoate, *i.e.*, where it is merely attempted but not carried into effect, as for instance, where the apparent transferor merely executes a sham sale-deed, but no property is actually conveyed to the apparent transferee and no creditor has been defrauded thereby; (b) when the fraud is accomplished or perfected, *i.e.*, where in consequence of the execution of the sham conveyance, the property could not be seized by the creditors, so that the creditors have been actually defrauded by reason of the transaction.

(a) *Where the fraud is inchoate*, the apparent transferor will be entitled to sue for a declaration that the deed of transfer was in the nature of a *benami*, and that nothing has been actually transferred to the grantee. "In India, where the benami system is common, it has been recognised by our Court that there may be a sham conveyance, which, though registered and delivered to the grantee, not being intended to pass the property but merely to be used as a blind to deceive creditors or others, conveys no estate to the nominal grantee"—*Sadashiv v. Trimbak*, 23 Bom. 146 (170). Where the purpose for which the assignment is made is not carried into effect and nothing is done under it, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property back from the assignee who has given no consideration for it—*Symes v. Hughes*, (1870) L.R. 9 Eq. 475 (cited in 33 Cal. 967, 982); *Pether Permal v. Muniandy*, 35 Cal. 551 (P.C.); *Dhirendra v. Chandra Kanta*, 36 C.L.J. 82, 68 I.C. 648, A.I.R. 1923 Cal. 154; *Jadu Nath v. Rup Lal*, 33 Cal. 967 (969); *Chenvirappa v. Puttappa*, 11 Bom. 708 (718); *Rangam-*

mal v. Venkatachin, 18 Mad. 378; *Maung Po Zu v. Maung Po Kwa*, 65 I.C. 322, A.I.R. 1921 L.B. 58, 11 L.B.R. 323; *Bansidhar v. Ajodhya*, 27 O.C. 175, 82 I.C. 333, 1 O.W.N. 248, A.I.R. 1925 Oudh 120; *Rajani Kanta v. Abani Kanta*, A.I.R. 1926 Cal. 850, 94 I.C. 33. Where a colourable conveyance is executed for the purpose of enabling the transferor to defraud his creditors, the transferor is entitled to recover back his property before the fraud is actually carried out, and there is a *locus penitentiae* until a creditor has been actually defrauded—*Govinda Kuar v. Lala Kishun Prosad*, 28 Cal. 370; *Sham Lal v. Amarendra*, 23 Cal. 460.

Mere intention not carried into effect ought not to be sufficient to deprive the party of the assistance of the Court in enforcing his rights; and if he either abandons his fraudulent purpose before it is accomplished or pays his debts to the full value of the property conveyed, the fraud should be regarded as purged. Thus, when in order to save his properties from being sold in execution of a decree from which he had preferred an appeal, the owner executed a sham deed of relinquishment in favour of another person (who was aware of the sham nature of the transaction) but being successful in the appeal sued that person for a declaration that the deed of relinquishment was colourable and did not convey title, it was held that the plaintiff was entitled to succeed. In such an event, a Court of Equity cannot rightly hold that the plaintiff must suffer because he had an improper motive, since no one has been defrauded thereby—*Jadu Nath v. Rup Lal*, 33 Cal. 967 (979). If in such a case, the Courts were to refuse aid to the plaintiff, they would be assisting in a fraud, for they would be giving an estate to a person (transferee) when it was never intended that he should have it—*Debia Chowdrani v. Bimola Soonduree*, 21 W.R. 424; *Jadu Nath v. Rup Lal*, 33 Cal. 967 (983).

In these cases, the transferee also will not be entitled to bring a suit to recover possession of the property, in respect of which he has no true right or title. When a transfer to defeat creditors is made in favour of the transferee by the collusive act of the transferor, the transferee will not be helped by the Court in getting possession of the property thus transferred, though the transferor in spite of his fraudulent conduct is allowed to be benefited thereby—*Raghavalu v. Adhinarayan*, 32 Mad. 323. See also *Babaji v. Krishna*, 18 Bom. 372; *Preo Nath v. Kazi Mahomed*, 8 C.W.N. 620. Here the Court will not assist the plaintiff (transferee) on ground of public policy, to recover a property or enforce a contract in respect of which he has no true title or right—*Yaramati v. Chundru*, 20 Mad. 326 (330).

It should be noted that in *Chenvirappa v. Puttappa*, 11 Bom. 708 and *Yaramati v. Chundru*, 20 Mad. 326, the Judges did not make any distinction between cases where the fraud was inchoate and cases where the fraud was perfected, and they have laid down as a general rule that (even in cases where the fraud is inchoate) the transferor will not be allowed to come into Court alleging his own fraud and ask the Court to set aside the fraudulent deed or make a declaration to protect him from the threatened consequences of his own act. But these cases have been dissented from by the Calcutta High Court in *Jadu Nath v. Rup Lal*, 33 Cal. 967 (969).

(b). *Where the fraud is perfected, i.e.*, where the creditors have been actually defrauded, the transferor will not be entitled to recover back the property from the transferee on the ground that the conveyance was a

merely colourable one. He cannot, in such a case, escape from the consequences of his fraud—*Yaramati v. Chundru*, 20 Mad. 326 (331); *Honapa v. Narsapa*, 23 Bom. 406 (413); *Rajani Kanta v. Abani Kanta*, A.I.R. 1926 Cal. 850, 94 I.C. 33; *Sarup Narain v. Madho Singh*, 30 I.C. 253, 18 O.C. 131; *Bansidhar v. Ajudhia*, 27 O.C. 175, A.I.R. 1925 Oudh 120, 82 I.C. 333; *Lalji v. Bachchoo*, 9 O.W.N. 275, A.I.R. 1933 Oudh 6; *Lachman Das v. Mulchand*, A.I.R. 1923 All. 411, 71 I.C. 441; *Maung Tin v. Ma Mai Myint*, 65 I.C. 459, 11 L.B.R. 83; *Maung Po Zu v. Maung Po Kwa*, 65 I.C. 322, 11 L.B.R. 323, A.I.R. 1921 L.B. 58. Where the intended fraud has been carried into effect, the Court will not allow the true owner to resume the individuality which he has once cast off in order to defraud others—*Jadu Nath v. Rup Lal*, 33 Cal. 967 (978). Where the illegal purpose has been answered by defeat of third person's rights, a claim for re-conveyance will be properly dismissed. The transferee will not be treated as a trustee holding for the benefit of the transferor. The *particeps criminis* stands on a quite different footing from an innocent third party, and if he has actually parted with the direct ownership of the property, he cannot at the same time have annexed to the ownership a trust in his own favour, the necessary effect of which would be to give success to a conspiracy for defeating the law—*Chenvirappa v. Puttappa*, 11 Bom. 708 (713, 718, 719). To lay down that when the illegal purpose has been fully or partially carried out, the transferor is nevertheless entitled to claim relief, would not only remove the risk of the sham transferor losing his property, which operates as a check upon knavery, but would also stain the administration of justice and make the Courts active instruments for securing to the guilty plaintiff the fruits of his successful fraud—a position which, it is hardly necessary to say, is absolutely indefensible—*Rangammal v. Venkatachari*, 18 Mad. 378; *Honapa v. Narsapa*, 23 Bom. 406 (413). Where the plaintiff with the object of defeating the claims of his creditors executed a colourable conveyance of his property in favour of another person, and the transferee successfully resisted the creditors of the plaintiff from seizing the property in execution of their decree, and then conveyed the property to a third person who took possession, *held* that the plaintiff would be precluded from maintaining a suit for recovery of the property. If in such a case the Court was to grant relief to a wrong-doer, it would be making itself a party to the fraud—*Gobordhan v. Ritu Roy*, 23 Cal. 692; *Banka Behari v. Rajkumar*, 27 Cal. 231; *Govinda Kuar v. Lala Kishen Prosad*, 28 Cal. 370; *Munisami v. Subbaraya*, 31 Mad. 97; *Sidlingappa v. Hirasa*, 31 Bom. 405. Where in order to defeat an execution by a judgment-creditor, the judgment-debtor invited his landlord to distrain and sell for rent not really due, the tenant should not be assisted by the Court in recovering the money realised by the sale—*Sims v. Tuffs*, 6 Carr. & P. 207 (cited in 11 Bom. 708, 713).

If, however, the transferor *remained in possession* of the property in spite of the execution of the sham conveyance, the transferee will not be permitted to bring a suit for possession of the property on the strength of the conveyance. As Benson J. observes: "If the defendant (transferee) were now seeking the assistance of the Court to obtain possession of the land from the plaintiff (transferor), it may well be that the Court would allow the plaintiff to plead the true rights of the parties, even though the plea involved a declaration by the plaintiff of his own turpitude. The Court would then allow the plea on grounds of public policy, and in order

that it might not itself be made an instrument to aid the defendant in his fraudulent claim to possession contrary to the real agreement with the plaintiff"—*Yaramati v. Chundru*, 20 Mad. 326 (332).

265. Suit to set aside transfer must be a representative suit:—

Para 4 of this section, which has been newly added, enacts that a suit instituted by a creditor to set aside a fraudulent transfer shall be instituted *on behalf of all the creditors*.

The *Special Committee* observes:—

"There has been some conflict of opinion whether a suit to set aside a transfer on the ground that it was made with intent to defeat or delay creditors should be brought on behalf of all the creditors or whether it is competent to any one creditor to institute such a suit. The trend of the decisions is in favour of a representative suit. In 34 Cal. 999, 16 Bom. 1 and 27 Bom. 322 it was held that the suit should be brought on behalf of all the creditors. The decisions under the corresponding section of 13 Eliz. c. 4, went the same way and it was held under that section that the action should be brought by the plaintiff on behalf of himself and all other unsatisfied creditors of the deceased: see *French v. French*, 6 De G. M. & G. 95; *Richardson v. Smallwood*, Jac. 552. In 42 Mad. 143, however, the opinion was expressed that a suit to avoid a transfer made with intent to defraud creditors may be instituted by a single creditor. We are unable to accept this opinion. The practice followed by the High Courts of Calcutta and Bombay is in accordance with form No. 13, Appendix D to Schedule 'I' of the Civil Procedure Code, and is based on the wholesome principle that the transferee should not be exposed to a multiplicity of suits at the instance of various creditors. We think it is desirable to give statutory recognition to this practice. We have accordingly added a new paragraph."

It is competent for *one creditor alone* to sue to set aside the fraudulent transfer, without impleading the other creditors of the transferor; but he must sue not in his individual capacity but in a *representative* capacity, *i.e.*, he must sue *on behalf of himself as well as all the other creditors*; and the decree will enure to the benefit of all the creditors—*Ishwar Timappa v. Devar Venkappa* 27 Bom. 146 (150); *Hakim Lal v. Mooshahar Shahu*, 34 Cal. 999 (1006); *Chatterput v. Maharaj Bahadur*, 32 Cal. 198, 217 (P.C.); *Shantilal v. Munshilal*, 56 Bom. 595, 139 I.C. 820, A.I.R. 1932 Bom. 498 (504); *Ebrahimbai v. Fulbai*, 26 Bom. 577 (581); *Burjorji v. Dhanbai*, 16 Bom. 1 (19); *Natha v. Maganchand*, 27 Bom. 322; *Palaniandi v. Appavu*, 30 M.L.J. 565, 34 I.C. 778 (*per* Coutts Trotter J.); *Sunder Singh v. Ram Nath*, 7 Lah. 12, A.I.R. 1926 Lah. 167 (168), 93 I.C. 1013; *Champo v. Shankar Das*, 74 P.R. 1912, 14 I.C. 232, 165 P.L.R. 1912; *Sri Thakurji v. Narsingh Narain*, 6 P.L.J. 48 (50), A.I.R. 1921 Pat. 53, 63 I.C. 788; *Chetty Firm v. Maung Po*, 7 Bur.L.T. 257, 23 I.C. 341. And hence the death of some of the creditors who were the parties originally to such a suit does not cause an appeal therein to abate, though the legal representatives were not substituted in time—*Sunder Singh v. Ram Nath*, (*supra*). This rule is based on perfectly sound and intelligible principle. To allow one creditor (in his individual capacity) to impeach the validity of a conveyance would expose the transferee to several attacks by different creditors, each of whom might litigate the same question in a different suit, and it is not inconceivable that the Court might arrive at different conclusions in different suits brought at the instance of the

different creditors—*Hakim Lal v. Mooshahar*, 34 Cal. 999 (1007). In England also it has been held that if an action is brought to set aside a conveyance on the ground that it is voidable under statute 13 Eliz. c. 5, it should be by a creditor on behalf of himself as well as all other creditors of the settlor—*Reese River Silver Mining Co. v. Atwell*, (1869) L.R. 7 Eq. 347; Daniell's Chancery Practice, pp. 201, 490; Seton on Decrees, p. 1372; May on Voluntary Conveyances (2nd Edn.), p. 525.

The contrary view taken in *Pokker v. Kunhammad*, 42 Mad. 143 (146, 149) and by Seshagiri Ayyar J. in *Palaniandi v. Appavu*, 30 M.L.J. 565, by Sadasiva Ayyar J. in *Ramaswami v. Mallappa*, 43 Mad. 760 (769) (F.B.), and by Venkatasubba Rao J. in *Narasimham v. Narayan*, 22 L.W. 592, 92 I.C. 405, A.I.R. 1926 Mad. 66, is no longer correct. Consequently the opinion expressed in *Lal Singh v. Jai Chand*, 12 Lah. 262, A.I.R. 1931 Lah. 70 (71), 130 I.C. 778, that the omission to sue by one creditor does not bar the general body of creditors, no longer holds good.

Whether the plaintiff has brought the suit in his individual capacity or whether the suit is of a representative character, depends upon the nature of the averments made in the plaint, the pleadings, and the decree that is ultimately passed. Where it is found that though the pleadings raised the larger issue between the transferor and the body of creditors, still the suit was not for the benefit of the creditors as a whole and the plaintiff was content with merely a money-decree in his favour and did not claim a decree in terms of Form No. 13, Appendix D to Sch. I, C. P. Code, held that the suit was not brought in a representative capacity—*Rahimtulla v. Rasulkhan*, 29 N.L.R. 246, A.I.R. 1933 Nag. 169.

An objection as to the frame of the suit on the ground of non-joinder of other creditors must be taken in the Court of first instance and ought not to be allowed to be raised in the appellate Court. If however the objection be taken for the first time in the appellate Court and the objection prevails, the plaintiff ought to be allowed an opportunity to amend the plaint, so as to frame the suit as one on behalf of himself and all the other creditors of the transferor—*Hakim Lal v. Mooshahar*, 34 Cal. 999 (1007); *Chetty Firm v. Maung Po*, 7 Bur.L.T. 257, 23 I.C. 341; *Burjorji v. Dhunbai*, 16 Bom. 1 (20).

Suit by decreeholder-creditor:—It has been held in some cases that a judgment-creditor who has got a decree on his debt is entitled to proceed in his individual capacity, and is not bound to bring a representative proceeding. Thus, it is said that an attaching judgment-creditor whose attachment has been raised on the claim petition of a transferee of the attached property, is not bound to bring a representative suit on behalf of all the creditors of the judgment-debtor to set aside the transfer as fraudulent under sec. 53 of the T. P. Act, but is competent to institute a suit to establish his right to proceed against the property under O. 21, rule 63, C. P. Code. The attaching judgment-creditor has a statutory right of suit given to him under O. 21 rule 63, C. P. Code, and that suit must necessarily be one brought by himself alone and is not a representative suit—*Pokker v. Kunhammad*, 42 Mad. 143 (146, 153), 36 M.L.J. 231, 51 I.C. 714; *Chettyar Firm v. Ma Sein*, 5 Rang. 588, A.I.R. 1928 Rang. 1 (3), 105 I.C. 582; *Chinamal v. Gul Ahmad*, 73 I.C. 719, A.I.R. 1923 Lah. 478. This view was based on the following rule of English law: "In an action to set aside an alienation under the statute (13 Eliz. C. 5) a creditor should sue on behalf of himself and all other creditors of the

grantor, except where he has recovered *judgment for his debt*, in which case he can obtain an order declaring the alienation as void against him and containing consequential directions for the satisfaction of his debt alone, *without mention of any other creditors, or their debts*”—Halsbury's *Laws of England*, Vol. XV, p. 89.

But this view is no longer good law, because the 4th para expressly lays down that the term 'creditor' *includes a decreeholder* whether he has or has not applied for execution of his decree. "We also do not agree with the view expressed by the High Court of Madras that a decreeholder is not a creditor and that he may therefore bring a suit on his own behalf to set aside the transfer."—*Report of the Special Committee*.

Suit by auction-purchaser:—A suit by the *auction-purchaser* of the property sold in execution of a decree obtained by a creditor of the judgment-debtor, for declaration that a conveyance by the judgment-debtor is fraudulent, and for possession, is not a suit under sec. 53 at all, and need not be instituted in a representative capacity on behalf of all the creditors. The test to be applied under this section is, whether if the plaintiff succeeds in the action the property claimed in the action would be available to the general body of creditors. If it would not, then the action cannot by any possibility be regarded as an action under sec. 53. In a suit by the auction-purchaser, it is obvious that the property claimed would not be available to the general body of creditors but would go to the plaintiff alone who has purchased it at an execution sale. The suit is really a suit for possession, and the prayer for declaration is only to remove a cloud thrown on the plaintiff's title—*Sri Thakurji v. Narsing Narain*, 6 P.L.J. 48 (50, 51), 2 P.L.T. 217, 63 I.C. 788.

Suit against insolvent after order of adjudication:—After an order of adjudication is made, the effect of which is to vest the administration of the insolvent's estate under the control of the Court, it is not open to a creditor of the insolvent to sue under this section to set aside a transfer made by the insolvent, without obtaining the leave of the Court as provided by sec. 16 (2) of the Provincial Insolvency Act (1907)—*Vasudeva v. Lakshminarayana*, 42 Mad. 684 (686). But in a very recent case the Madras High Court has ruled that there is nothing in the Prov. Insolvency Act to prevent the creditors and the Official Receiver from proceeding under sec. 53 of the T. P. Act if they wish; and the fact that they have another remedy under sec. 53 of the Prov. Ins. Act, 1920 (sec. 36 of the Prov. Ins. Act of 1907) does not deprive them of their right of suit under sec. 53 of the T. P. Act—*Official Receiver v. Bastiao Souza*, 23 L.W. 643, A.I.R. 1926 Mad. 826, 95 I.C. 300.

266. Presumption of fraudulent intention:—The second para. of the old section contained a rule of evidence, indicating the circumstances under which the fraudulent intention might be presumed. This para has been omitted from the present section for the following reasons:—

"Paragraph 2 of section 53 lays down a rule of evidence. It says that when the effect of any transfer of immoveable property is to defeat or delay creditors, and the transfer is made gratuitously, the transfer may be presumed to have been made with intent to defeat or delay creditors. The words 'when the effect of any transfer is to defeat or delay creditors' have given rise to considerable difficulty and the Courts have resorted to English decisions to determine when a voluntary transfer can be said to have that effect. But even in England the course of decisions on the

subject is not uniform. In *Spirett v. Willows*, 3 DeG.J. & S. 293, Lord Westbury laid down two separate rules—one as to creditors existing at the date of the transfer and another as to subsequent creditors. In *In re Lane-Fox* (1900) 2 Q.B. 508, Wright, J., adopted the second rule laid down by Lord Westbury, and held that an honest voluntary settlement made by a solvent person was not void merely because it proved some years afterwards *to have the effect* of defeating or delaying subsequent creditors. In *Freeman v. Pope*, 5 Ch. App. 538, it was laid down that it is not necessary to prove any *actual* intention to delay creditors, where the *facts* are such as to show that the necessary consequence of what was done was to delay them, and that in such cases the intent *must be inferred*. This doctrine that the intent *must be inferred* was criticised in *Ex parte Mercer*, 17 Q.B.D. 290, a case which was approved by the Court of Appeal in *In re Holland* (1902) 2 Ch. 360.

“The principle now generally adopted by the Courts in England is that laid down by Kindersley, V.C., in *Thompson v. Webster*, 4 Drew 628, at p. 632 as follows:—

‘The principle now established is this: the language of the Act being that any conveyance of property is void against creditors if it is made with intent to defeat, hinder or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the intention of the settlor in making the settlement, was to defeat, hinder or delay his creditors.’

“The above statement of the law was accepted as correct by the Judicial Committee in *Godfrey v. Poole*, 13 App. Cas. 497. Again, in *In re Holland*, (1902) 2 Ch. 360, it was held by the Court of Appeal that in considering whether a conveyance was void under the statute, the Court must look at the whole of the circumstances surrounding the execution of the conveyance and see whether it was in fact executed with the intent to defeat and delay creditors. It is, therefore, proposed the delete paragraph 2 of section 53 and to leave the determination of the question of intent to be dealt with according to the ordinary rules of evidence.”—*Report of the Special Committee* (1927).

Thus, from the above statement it is evident that by omitting the second para of the old section, the Legislature intends to lay down that the intent to defraud, defeat or delay must not be presumed merely from the effect of the transfer or from absence or inadequacy of consideration, but is to be established by looking to *all the circumstances* surrounding the execution of the conveyance. See next Note.

267. Indicia of fraud:—It is a truth confirmed by experience that in the great majority of cases fraud is not capable of being established by positive and tangible proofs. It is by its very nature secret in its movements. It is therefore sufficient if the evidence given is such as may lead to the inference that fraud must have been committed. In the generality of cases circumstantial evidence is the only resource in dealing with questions of fraud—*Parkash Narain v. Birendra Bikram*, 7 Luck. 131, A.I.R. 1931 Oudh 333, 132 I.C. 51. Fraud may be presumed from the following circumstances: (1) where the transferor disposes of his entire estate, without any exception, including his wearing apparel; (2) where he remains in possession of the property although possession is professedly transferred; (3) where the transfer is made in anticipation of or pending

a suit; (4) where the transfer is made in secret; (5) where there is a trust between the parties (for "fraud is always apparelled and clad with a trust, and trust is the cover of fraud"); (6) where the deed contains a statement that the transfer is made honestly, truly and *bona fide*—*Twyne's case*, 3 Coke's Rep. 80, 1 Sm. L.C. 1, cited in *Bhagwant v. Kedari*, 25 Bom. 202 (218). Similarly, the absence or gross inadequacy of consideration, the indifference of the purchaser as to the enforcement of any claim he may have had as to inspection or valuation before purchase, the continuance of the transferor in possession and control after the sale, the secrecy in making the arrangement, and the attempt to include in it all available assets, must always be considered in determining the existence of good faith of the transaction—*Bhagwant v. Kedari*, 25 Bom. 202 (228). Where it was found that the vendor having many debts to pay sold away all his property reserving nothing, that the vendee purchased the property without even taking care to value it, that the consideration consisted of debts some of which had become time-barred and others had not then become due, that the properties remained in the possession of the vendor who paid the assessment of the same, and that the consideration was grossly inadequate, *held* that the sale-deed was fictitious and the transaction was a colourable one intended to defraud creditors—*Nana v. Rautmal*, 22 Bom. 255. The embarrassed circumstances of the vendor, the fact that the sale was hurried on after his house had been attached, and when the attachment of the lands was imminent, the hurried registration, the sale of other lands for a suspicious consideration, the hasty manner in which the price was fixed without any valuation of the arrears and other things he was taking over in addition to the lands, all these go to show that the transaction was effected for the purpose of defeating the creditors and that there was no good faith on the part of the transferee—*Palamalai v. South Indian Export Co.*, 33 Mad. 334 (337, 338). So also, the motive with which a purchase is entered into, the position of the parties to the transaction and their relation to one another, the possession of the property concerned and of the title-deeds thereof, the source and adequacy of the purchase money, and the previous and subsequent conduct of the parties to the transaction, all afford valuable data for determining the intention of the parties, and the nature of the interest, if any, sought to be created—*Ahmudi Begam v. Raja Udit Narain*, 17 O.C. 173, 25 I.C. 264. Thus, in a case before the Privy Council, the secrecy and haste with which the mortgage-deed was executed, the subsequent negotiations for a composition with creditors on a payment by them to get the mortgage revoked, the non-production of material books, the unsatisfactory nature of the evidence as to the settlement of the accounts on which the mortgage was based, the relation of the parties and the reservation of the entire usufruct of the immoveable properties for the wife and children of the debtor, were held by their Lordships to prove irresistibly that the mortgage was in fraud of creditors—*Ghansham Das. v. Uma Pershad*, 23 C.W.N. 817 (P.C.), 50 I.C. 264.

If the evidence shows that the transactions were not *bona fide*, that they were made gratuitously and presumably to defraud the plaintiff, he can impeach the transfers, and the mere fact that mutation had been effected in favour of the so-called transferees is immaterial—*Parkash Narain v. Birendra*, 7 Luck. 131, A.I.R. 1931 Oudh 333, 132 I.C. 51, 8 O.W.N. 593.

268. Transfer with intent to defraud subsequent transferees:— See sub-section (2). The old section contained the words "*prior* or subsequent transferees". The word '*prior*' has now been omitted, and the reason for the omission is stated as follows:—

"The first paragraph of section 53 contains the words '*prior* or subsequent transferees,' but it is difficult to see in what cases a prior transferee could have any reason to complain; for a completed transfer must always, in the absence of a special contract binding the transferee, take precedence of a later transfer: see section 48 of the Act. Hence we have omitted the word '*prior*' in sub-section (2) of the section."—*Report of the Special Committee* (1927).

The old section also contained the words "co-owners or other persons having an interest in such property;" these words have also been omitted for the following reasons:—

"It is difficult to conceive of any case in which a co-owner or other person having an interest in the property could be defeated by a voluntary transfer made by the transferor; and these words find no place in any of the corresponding English Statutes. We have accordingly omitted these words in sub-section (2)."—*Report of the Special Committee*.

A person who purchases the property of the fraudulent transferor at a sale held in execution of a decree obtained by a creditor of the transferor, is not a subsequent transferee within the meaning of this section, because he is not a transferee by act of parties but by operation of law, and also because he was not the person intended to be defrauded by the transferor—*Vasudeb v. Janardan*, 39 Bom. 507, 29 I.C. 497 (498). In this connection see the cases of *Sami Asari v. Adinam*, 12 L.W. 718, 61 I.C. 580 (583), and *Sri Thakurji v. Narsingh*, 6 P.L.J. 48 (50), though these cases do not strictly fall under this sub-section.

269. Sub-section (2), Second para:—This para is new, and has been inserted for the following reasons:—

"Coming now to transfers made with intent to defraud subsequent transferees for value, we have already referred to the English cases by which it was determined that every voluntary conveyance of immoveable property was void as against a subsequent purchaser for value. These decisions, as stated above, were followed by Sale, J. in 22 Cal. 185, but the law in England was altered by section 2 of the Voluntary Conveyances Act, 1893 (56 and 57 Vict. c. 21), by which it was provided that a voluntary conveyance, if made *bona fide* and without any fraudulent intent, should not be deemed fraudulent (within the meaning of 27 Eliz. c. 4) by reason of any subsequent purchase for value. Section 2 of the Voluntary Conveyances Act has been reproduced in section 173 of the English Law of Property Act, 1925. We think that a similar provision should be made and we have done so accordingly in sub-section (2)."—*Report of the Special Committee*.

53A. Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

Part performance.

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the

transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

This section has been newly added by sec. 16 of the Transfer of Property Amendment Act (XX of 1929).

270. Previous law:—Before the enactment of this section there were three views as to the rights of the vendor and vendee in cases where the vendor delivered possession of immovable property worth Rs. 100 or upwards to the vendee but executed no registered conveyance. These views are considered in detail:—

*First view:—*When a person sells immovable property worth more than Rs. 100 by receiving the purchase money and delivering the property to the vendee, and executes a conveyance which is not registered according to sec. 54, the sale is not complete and the property does not pass to the vendee; and the vendor is entitled to bring a suit to *eject the vendee and to recover possession*. The vendee is not entitled to plead part performance, because the express provisions of sec. 54 exclude all considerations of equity based on part performance—*Lalchand v. Lakshman*, 28 Bom. 466 (470, 472); *Kurri Veerareddi v. Kurri Bapireddi*, 29 Mad. 336 (349) (F.B.). A rule of equity can never be put forward to annul a positive enactment. The doctrine of part performance cannot override the provisions of the Transfer of Property Act as regards sale, mortgage, exchange, lease and gift—*Ram Gopal v. Tulsi Ram*, 51 All. 79 (F.B.), 26 A.L.J. 952, 116 I.C. 861, A.I.R. 1928 All. 641 (647, 649). The vendee cannot plead that the vendor by receiving a part of the purchase-money is estopped from recovering the property, for the principle of estoppel cannot be invoked to defeat the plain provisions of a statute—*Jagabandhu v. Radha Krishna*, 36 Cal. 920 (922); nor can the vendee plead that he is entitled to specific performance of the contract of sale, because the law does not permit the Court to enforce specific performance on a *counter-claim* made by the defendant. The remedy of the vendee is to bring a *suit* for the specific performance of the contract of sale—*Kurri Veerareddi v. Kurri Bapireddi*, 29 Mad. 336 (351, 353) (F.B.). (The other mode in which the vendee can acquire ownership under such circumstances is by 12 years' adverse possession). Where the defendant

entered into possession of a land under a verbal agreement by the plaintiff for the grant to him of a permanent lease, and thereafter be erected valuable structures on the land, but the plaintiff afterwards refused to grant the lease and sued to eject the defendant treating him as a monthly tenant; *held* that in view of the provisions of sec. 107 in the absence of a registered instrument the verbal agreement alone could not create a permanent lease in favour of the defendant, and that the doctrine of part performance could not be applied to override the mandatory provisions of this Act so as to nullify the requirement of a registered instrument—*Ariff v. Jadunath*, 58 Cal. 1235 (P.C.), 35 C.W.N. 550, A.I.R. 1931 P.C. 79, 131 I.C. 762 (reversing *Ariff v. Jadunath*, 55 Cal. 1090).

[*N.B.*—This view does not recognise the doctrine of part performance, and has been rejected by the Legislature in enacting the present section.]

Second view:—In a large number of cases it has been held that although a transaction has been clothed imperfectly with legal formalities (*i.e.*, though the sale-deed has not been registered) still equity will support the transaction if it has been acted upon by the parties (*e.g.*, by delivery of the property to the vendee). Thus, where two persons sold each other's property among themselves by registered deeds, but under a subsequent parol agreement of exchange they remained in possession of their respective properties, and long after the transaction one of the parties brought a suit to eject the other on the strength of the sale deed ignoring the agreement of exchange, *held* that the transaction of exchange, having been long acted upon by the parties, become effectually binding upon them, in spite of the fact that it was not registered under the provisions of sec. 118 read with sec. 54—*Salamat v. Masha Allah*, 40 All. 187, 16 A.L.J. 68, 43 I.C. 645. See also *Dada v. Bahiru*, 29 Bom. L.R. 1419, 105 I.C. 754, A.I.R. 1927 Bom. 627 (628). The plaintiffs conveyed certain properties in 1906 to the defendants under a registered mortgage by conditional sale. Subsequently in 1908 the parties arrived at an arrangement which was embodied in an unregistered document under which the defendants agreed to take possession of a portion of the property absolutely free from the liability to redemption, and the plaintiffs were to take possession of the remainder free from the mortgage-debt. The defendants took possession of the property allowed to them under the arrangement, and the plaintiffs continued in possession of the remainder. In 1919 the plaintiffs sued to redeem the property in the possession of the defendants, who thereupon set up the unregistered agreement in their defence. *Held* that the transaction of 1908 though embodied in an unregistered document had still been acted upon by the parties, and under the equitable doctrine of *part performance* the plaintiffs were estopped from going behind the agreement and claiming redemption—*Sandu Walji v. Bhikchand*, 47 Bom. 621 (626, 629), A.I.R. 1923 Bom. 473, 75 I.C. 118. Where the vendee enters into a contract for the purchase of certain property, pays the whole of the consideration money and obtains possession, he acquires a right to the property even though the conveyance has not been registered, on the equitable doctrine of *part performance*; and therefore a decree-holder of the vendee can attach the property and bring it to sale as the property of the vendee—*Jnan Chandra v. Rajani*, 22 C.W.N. 522 (525), 41 I.C. 850, following *Mahomed Musa v. Aghore Kumar*, 42 Cal. 801 (P.C.). Where the owner of a property contracted to sell some lands to the defendant, received a portion of the purchase money, delivered possession but

executed no conveyance, and subsequently sold the same lands to the plaintiff (who had *notice* of the prior contract) by a registered deed, and thereupon the plaintiff sued to recover possession relying on the registered deed, *held* that the plaintiff's suit must fail, and that the defendant would be entitled to get a conveyance on the basis of the oral sale, on payment of the balance of the purchase-money—*Desaibhai v. Ishwar*, 44 Bom. 586, 22 Bom.L.R. 764, 57 I.C. 447. But while there is no doubt that the rightful owner is estopped in a suit for recovery of possession from setting up his own title by reason of the contract which has been performed in part, the doctrine should not be applied without reference to the question whether the right to claim specific performance of the contract is or is not still subsisting. The doctrine will hold good only if the contract is still capable of specific enforcement, and cannot be applied if the time for specific performance of the contract has expired—*Kalipada v. Fort Gloster Jute Co.*, 31 C.W.N. 348, 100 I.C. 866, A.I.R. 1927 Cal. 365 (369). In other words, when in pursuance of an agreement to transfer a property the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents have been executed, *provided that specific performance can be obtained* between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined (*i.e.*, provided that the period of limitation for a suit for specific performance has not elapsed)—*Gajendra v. Ashraff Hossain*, A.I.R. 1923 Cal. 130, 27 C.W.N. 159 (164), 69 I.C. 707; *Shyam Kishore v. Umesh Chandra*, 24 C.W.N. 463 (464), 31 C.L.J. 75, 55 I.C. 154; *Haripada v. Nirod Krishna*, 33 C.L.J. 437, 61 I.C. 687; *Raghunath v. Sukan*, 11 P.L.T. 478, A.I.R. 1930 Pat. 53, 123 I.C. 799. Where the plaintiff, the owner of certain immoveable property, agrees to sell the property to the defendant and delivers possession to him but executes no conveyance, and afterwards seeks to recover possession of the property from the defendant, the latter will be entitled to defeat the plaintiff's claim or possession and to plead the doctrine of part performance as well as to plead by way of defence that the agreement being at the date of suit *still capable of specific enforcement*, he is entitled to remain in possession of the property as against the plaintiff—*Bapu Apaji v. Kashinath*, 41 Bom. 438 (F.B.), 19 Bom.L.R. 100, 39 I.C. 103; *Immudipattam Thirugnana v. Peria*, 24 Mad. 377 (P.C.); *Venkayamma v. Appa Rao*, 39 Mad. 509 (P.C.); *Vizagapatam Sugar Co. v. Muthuramareddi*, 46 Mad. 919 (F.B.) (overruling *Ramanathan v. Ranganathan*, 40 Mad. 1134 and *Kurri Veerareddi v. Kurri Bapireddi*, 29 Mad. 336); *Venkiah v. Guraviah*, 50 M.L.J. 669, A.I.R. 1926 Mad. 757, 96 I.C. 290; *Begum v. Muhammad Yakub*, 16 All. 344 (350); *Puchha Lal v. Kunj Behari*, 18 C.W.N. 445, 20 I.C. 803; *Karamath v. Latchmi*, 13 Bur.L.T. 119, 61 I.C. 675 (679); *Maung Myat v. Ma Dun*, 2 Rang. 285 (302) (F.B.), 81 I.C. 857, A.I.R. 1924 Rang. 214. It should be noted that the English law on this subject is the same. If a vendor gets possession under a contract of sale, he acquires the same right as if the land has actually been conveyed to him—*Walsh v. Lonsdale*, 21 Ch. D. 9. And the English authorities further indicate that the doctrine is applicable only in those cases where specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined—*Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; *Potter v. Potter*, (1750) 1 Ves. Sen. 437.

[N.B.—This view based on the doctrine of part performance has been accepted by the Legislature in the present section, but the limitation as to the application of the doctrine has not been approved.]

Third view:—In some other cases the High Courts have gone so far as to say that even if at the time when the vendor brought the suit to recover possession from the vendee the latter's suit for specific performance of the contract of sale *had become barred*, the vendee would *still be entitled* to remain in possession as against the vendor—*Venkatesh v. Mallappa*, 46 Bom. 722, 24 Bom.L.R. 242, A.I.R. 1922 Bom. 9, 66 I.C. 868; *Gangaram v. Laxman*, 40 Bom. 498 (502); *Shafiqal Haq v. Krishna Gobinda*, 23 C.W.N. 284, 47 I.C. 428; *Vizagapatam Sugar Co. v. Muthuramareddi*, 46 Mad. 919 (928) (F.B.); *Mehar Ali Khan v. Arutunnessa*, 25 C.W.N. 905, 67 I.C. 167; *Salamat v. Masha Allah*, 40 All. 187; *Sandu v. Bhikchand*, 47 Bom. 621, A.I.R. 1923 Bom. 473, 75 I.C. 118; or against a subsequent registered purchaser from the vendor—*Laxman v. Ravji*, 25 Bom.L.R. 1027, 77 I.C. 305, A.I.R. 1924 Bom. 150 (151); but of course in such a case the vendee will not be entitled to get a conveyance from the vendor; he will have to remain in possession for more than 12 years before he can acquire a good title—*Venkatesh v. Mallappa*, 46 Bom. 722 (726).

[N.B.—This view as to exemption from the bar of limitation has also been accepted by the Legislature. See Note 272 headed "No limitation" below.]

Thus, there were three views as to the effect of absence of a registered deed of sale in case of immoveable property worth Rs. 100 or upwards. One view was that the express words of the statute must prevail and that no title was created by mere delivery of possession, in the absence of a registered deed. Another view was that even in the absence of a registered instrument of conveyance, the vendor against whom the purchaser could maintain a suit for specific performance of an oral or unregistered written agreement for sale was disentitled from recovering possession from the purchaser, provided that the Court deciding the question of ejectment had jurisdiction to decree specific performance and the circumstances were such as to entitle the defendant to such a decree in the suit. This view is based upon the English case of *Walsh v. Lonsdale*. A third view would refuse to the vendor (or to a purchaser taking from him with notice of the prior transaction) any right to eject even though the time has elapsed within which a suit for specific performance is allowed by the Limitation Act.

Recommendations of the Civil Justice Committee:—The Civil Justice Committee recommended the rejection of the doctrine of part performance, because the law of registration would be rendered nugatory by that doctrine. For, if the purchaser omits to comply with the requirement of a registered document, and if in spite of it, it is held (relying on the doctrine of part performance) that no objection based upon non-compliance with the statutory requirement can be taken nor should be given effect to as between the vendor and purchaser, then the requirement as to registration becomes a dead letter, and "people will constantly fail to comply with the law, because the law will constantly excuse".....It is idle to say (sec. 54) that certain transfers can be made only by a registered instrument, if nevertheless in such cases delivery of the property in pursuance of an oral agreement is to amount to a

valid transfer, by applying the rule of part performance..... This doctrine is antagonistic to the law of registration. If the intention of the legislature in introducing compulsory registration was to render titles certain by enabling people to act according to the state of the title as disclosed by the register, the introduction of the English doctrine should not be permitted in derogation of the statutory requirements. See the *Civil Justice Committee Report*, pp. 449-454. These observations were based on *Kurri Veerareddi v. Kurri Bapireddi*, 29 Mad. 336 (F.B.).

The recommendations of the Civil Justice Committee have *not been accepted* by the Legislature in enacting the present section.

Object of the new section:—"By section 4 of the Statute of Frauds (1677) (29 Car. II, c. 3), it is provided that no action or suit shall be maintained on an agreement relating to land which is not in writing signed by the party to be charged with it. The strict application of the provision led to great hardship in cases where a parol agreement relating to land had been partly performed by one party and yet he could not sue the other party for specific performance. Thus the latter party was enabled to practise a fraud upon the former. In such cases the Courts intervened on equity and enforced specific performance, holding that part performance took the cases out of the Statute of Frauds. The general ground upon which the doctrine is based is prevention of fraud. It is said that where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that, if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice (*see* Story on Equity, section 1045).

"In applying the doctrine of part performance the Courts have confined it within strict limits. From the decided cases the following may be taken to be the essential elements necessary for the application of the doctrine:—

- (1) that the transferee has been put in possession of the property;
- (2) that his possession can be referred to the particular transfer and not to any other relationship;
- (3) that it will amount to a fraud on the part of the transferor to back out of such transfer; and
- (4) that the terms of the transfer can be ascertained with reasonable certainty.

"Notwithstanding weighty opinion to the contrary, the doctrine is still found to be necessary in England. In India the position is somewhat different though the doctrine is just as applicable. In England the Statute of Frauds is a bar to a suit or action when the agreement is not in writing; in India registration is necessary to the validity of a transfer. Notwithstanding this difference the need for the prevention of fraud is the same in both countries. Hence, the doctrine has been applied by the Indian Courts to cases where the transfer was not effected by a registered instrument. In the case of *Mahomed Musa v. Aghore Kumar Ganguli* (42 Cal. 801, 42 I.A. 1), their Lordships of the Privy Council observed:—

"They do not think that there is anything either in the law of India or of England inconsistent with it (the doctrine of part performance), but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison v. Alderson* (8 App. Cas. 467), founded on such part performance

.....the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. * * *

'Many authorities are cited in support of these propositions from English and Scotch law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange (1 Ves. 441) may be here repeated: 'if confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity.' Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary it follows them.'

"The doctrine has been applied to numerous cases in India, as in:—

- (1914) 18 C.W.N. 445.
- (1915) 20 C.W.N. 149.
- (1917) 22 C.W.N. 522.
- (1918) 23 C.W.N. 284.
- (1919) 24 C.W.N. 463.
- (1920) 25 C.W.N. 905.
- (1917) 41 Bom. 438.
- (1921) 45 Bom. 1170.
- (1918) 40 All. 187.
- (1920) 46 Mad. 919.
- (1923) 1 Ran. 419.
- (1925) 3 Ran. 243.

"We do not think that the time has arrived when this equitable doctrine can be safely abrogated in favour of a rigid application of the law of registration. Ignorant transferees in this country who have partly performed the contract require a greater measure of protection than even a transferee in England. When a transferee has in the faith that the transfer would be completed according to law taken possession, it would be inequitable to allow the transferor to treat the transferee as a trespasser. We, therefore, think that statutory recognition should be given to the doctrine of part performance. At the same time care should be taken that the law of registration is not evaded and that the introduction of the doctrine does not lead to prejudice and frauds which it is the object of the doctrine to prevent. With this end in view we propose—

- (1) that the agreement should be in writing signed by the party or his agent whom it is sought to bind;
- (2) that the transferee should in part performance of the contract take possession of the property or, if already in possession, should continue in possession and in the latter case should do some act in furtherance of the contract;
- (3) that the transferee, seeking to avail himself of the doctrine, should perform or be willing to perform his part of the bargain as contained in the writing;
- (4) that when the contract has been partly performed all rights and liabilities under the contract should arise and be enforceable

- as between the parties to the contract notwithstanding that the transaction has not been completed according to law; and
- (5) that the application of the doctrine should not affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

“We think that it should be made clear that by reason of the part performance, although the terms of the contract are made binding on the parties thereto, *the transferee will not get a good title unless the transfer is effected according to law, that is, executed and registered.* In this view, *registration would still be necessary* in order that the transferee may acquire a perfected and marketable title. But, although on account of non-registration no title has passed, yet by reason of part performance equities have arisen which Courts of law ought to recognise and enforce. As pointed out in *Mohamed Musa's case*, ‘when a contract has been partly performed, the matter has advanced beyond the stage of contract and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded,’ *i.e.*, as if the transaction had been completed according to law. We propose, therefore, that all the rights and liabilities arising under the contract as expressed in the writing should be enforceable but no more. There is no difficulty in the case of a sale or a mortgage because a contract for sale or mortgage need not be in writing or registered. Questions may arise in the case of an agreement for a lease which creates a present demise. Such agreements require to be in writing and registered. If in performance of such an agreement the lessee takes possession, he may not even sue for specific performance because he cannot prove the agreement if it be not registered. (*See* 26 C.W.N. 329). Such a state of things enables the lessor to treat the lessee in possession as a trespasser and thereby practise a fraud upon him. We think that the Courts should be in a position to give relief to such a lessee in possession. We propose therefore that in such a case the writing containing the agreement may be proved in Court notwithstanding non-registration. In order to avoid perjured evidence, it is desirable in our opinion that the agreement should in all cases be in writing when the doctrine of part performance is sought to be invoked.

“We are not unmindful of the weighty opinion expressed in Chapter 35 of the report of the Civil Justice Committee. That Committee has recommended a rigid application of the law of registration and the rejection of the doctrine of part performance. The principal objections formulated by the Committee are—

- (1) ‘The recognition of the doctrine is inconsistent with the necessity for registration.’ We have shown that, inasmuch as part performance cannot confer a title, registration would still be necessary.
- (2) ‘A mass of perjured evidence will be introduced if oral agreements are allowed to be proved.’ To meet this objection we have proposed that the agreement should be in writing.
- (3) ‘If a registration is made essential in every case people will get accustomed to it and there will be no necessity for the application of the doctrine of part performance.’ We do not think the country has arrived at that stage when the necessity for the application of this equitable doctrine has ceased to exist.

"We think that with the safeguards we have suggested the doctrine should be given statutory recognition. In fact, our proposal does not go beyond what the Courts in India have already recognised by judicial decisions. We have deliberately excluded voluntary transfers from the operation of the doctrine of part performance because obviously no equities arise in favour of volunteers.

"It is necessary in this connection to have a new section in the Specific Relief Act dealing with the same subject, and we have, therefore, proposed the addition of section 27A in Ch. II of the Specific Relief Act. We propose that section 49 of the Registration Act should be amended so as to provide for the admission of unregistered documents, required by law to be registered, for the purpose of proving part performance within the meaning of the new section 53A of the Transfer of Property Act and section 27A of the Specific Relief Act."—*Report of the Special Committee.*

270A. Further explanation of this section:—

"Inasmuch as the statutory recognition of part performance is a matter of considerable importance, we think it desirable to explain in further detail the reasons for the various recommendations we are making.

(1) *First para*—In order to avoid perjured evidence which is likely to centre round an oral agreement we are providing for the agreement to be *in writing*.

(2) *Second para*—If possession be taken in part performance of the contract, that fact along with the writing ought to be sufficient to attribute the possession to the agreement. But in the case of a person already in possession we have recommended some *further act of performance*, e.g., by payment of different rent or the spending of money, because the possession may not be exclusively referable to the agreement.

(3) *Fourth para*—In providing that the transferor shall be debarred from enforcing against a transferee any rights except such as arise out of the agreement, we desire to make it clear that the rights arising out of the contract as between the transferor and the transferee should be enforceable as if the transfer has been completed according to law. This provision will prevent a transferor from ejecting a transferee who has in part performance of the contract taken possession, and at the same time enable the transferor to sue the transferee upon his covenant, say, to pay rent. The effect of this provision will be that the mutual covenants between the transferor and the transferee will be operative, though by reason of non-registration no title has passed. *This will necessitate the completion of the transfer according to law by execution and registration* in order that the transferee may get a marketable title. Thus, the law of registration will not be evaded.

(4) *Fifth para*—We have provided for a further safeguard in that the equities arising out of part performance *may not affect the rights of a transferee for value without notice*. This will again have the effect of requiring the completion of the transfer according to law because, otherwise, the first transferee will be in a precarious position in the case of a subsequent transferee for value without notice asserting his rights under such subsequent transfer. The claims of the subsequent transferee will, of course, be subject to the doctrine that, ordinarily, possession will constitute notice of the title of the person in possession. Thus the transferor will not find it easy to practise a fraud upon the transferee in posses-

sion by making a second transfer. The second transferee will have notice of the title of the first transferee in possession whatever that title may be. The protection given to the second transferee is not illusory because under the amended section 3 of this Act he will be regarded as having notice of the title of the person in actual possession and not of the title of the prior transferee who may be only in constructive possession. Therefore, it would be still necessary for the first transferee in constructive possession to have his transfer perfected according to law *by registration* and thereby acquire an indefeasible title."—*Report of the Special Committee*.

271. Scope of new section:—One of the conditions for the application of the doctrine of part-performance is that the transferee has performed or *is willing* to perform his part of the contract. The Legislature could not have intended, in recognizing an equitable doctrine, to do equity to one party to the agreement and not to the other. But it is not necessary that the transferee's willingness should continue throughout the period of the agreement, if there are substantial acts of part performance which are unequivocally referable to the written agreement—*Suleman v. Patell*, 35 Bom.L.R. 722, 145 I.C. 557, A.I.R. 1933 Bom. 381 (384).

Section does not supersede registration:—This section merely lays down that the transferor will not be entitled to eject the transferee under the circumstances mentioned herein. But it does not give any title to the transferee. That title will have to be completed by execution and registration of a deed of transfer. See clauses (3) and (4) of Note 270A. See also *Ram Gopal v. Tulshi*, 51 All. 79 (F.B.), 26 A.L.J. 952, 116 I.C. 861, A.I.R. 1928 All. 641, where this subject is very fully discussed.

Value of unregistered document:—The unregistered document embodying the terms of the contract shall be received in evidence for the purpose of proving part performance. The proviso to sec. 49 of the Registration Act, newly added by the T. P. Amendment Supplementary Act XXI of 1929, runs as follows:—

"Provided that an unregistered document affecting immoveable property and required by this Act or by the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance under Ch. II of the Specific Relief Act or as evidence of part performance of a contract for the purposes of sec. 53A of the Transfer of Property Act, or as evidence of any collateral transaction not required to be effected by a registered instrument."

See *Suleman v. Patell*, 35 Bom.L.R. 722, A.I.R. 1933 Bom. 381 (385).

272. No Limitation:—"There is some conflict of decisions in the Indian Courts with regard to the period within which equitable relief can be given to parties to a transaction when there has been no registered instrument. One view is that such relief can be given only within the period during which a suit for specific performance would lie, the other view being that such relief can be given even after that period has expired. It seems to us that the first view does not go far enough, in all cases, to afford the relief which the equities arising out of part performance require. Because, even after the period of limitation, when part performance has taken place, the parties stand in the same relation to each other as they did within the period of limitation, and the equities which arose within that period remain the same. In fact, the longer the possession in part performance, the higher will be the equities. We,

therefore, think that, in order that the relief may be effective, it ought to be available at all times during which the transferee is in possession in part performance of the contract and subject to the other conditions which we have proposed. In 46 Mad. 919 and 23 C.W.N. 284, the Courts took the view that the relief was available even after the period of limitation for specific performance was over. We feel that, in order that the relief may be real, it ought to be available as between the parties to the transaction even after such period of limitation.”—*Report of the Select Committee.*

This section supersedes 27 C.W.N. 159, 24 C.W.N. 463 and 33 C.L.J. 437 (cited under “*second view*” in Note 270) so far as they lay down that part performance can be pleaded as defence so long as a suit for specific performance is not barred by limitation. It also overrules the view taken in 46 Bom. 722 (cited under “*Third view*” in Note 270) that the vendee will not get a conveyance from the vendor after the expiry of the period of limitation for a suit for specific performance.

272A. No retrospective effect:—This section has no retrospective effect, *i.e.*, it has no application to an agreement to transfer immoveable property which was entered into prior to 1st April 1930—*Kanji v. Shanmugam*, 63 M.L.J. 587, 139 I.C. 870, A.I.R. 1932 Mad. 734. In fact the Privy Council judgment in *Ariff v. Jadunath*, 58 Cal. 1235 has killed the doctrine of part performance in respect of transactions occurring before the Amendment Act was passed. But see *Suleman v. Patell*, 35 Bom.L.R. 722, A.I.R. 1933 Bom. 381 (384).

273. There must be a written document:—The first para of this section contains the words “by writing”, and thereby requires the agreement to be in writing. In many of the cases cited in Note 270 above, the doctrine of part performance was applied even though there was no *written* document. The following cases may be cited as instances:—

Salamat v. Masha Allah, 40 All. 187, 43 I.C. 645;
Bapu Apaji v. Kashinath, 41 Bom. 438;
Desaibhai v. Ishwar, 44 Bom. 586;
Maung Myat v. Ma Dun, 2 Rang. 285;
Maung Tun v. Maung Dun, 2 Rang. 313;
Ma Htay v. U Tha Hline, 2 Rang. 649 (652, 653);
Dada v. Bahiru, 29 Bom.L.R. 1419, A.I.R. 1927 Bom. 627.

These cases are no longer good law. Under the present section, the doctrine can be applied only when there is a *written* document from which the terms of the contract can be ascertained with reasonable certainty—*Aziz Ahmad v. Alauddin*, A.I.R. 1933 Pat. 485; *U Lu Pe v. Oo Kim*, A.I.R. 1933 Rang. 136 (138); *Suleman Haji v. Patell*, 35 Bom.L.R. 722, 145 I.C. 557, A.I.R. 1933 Bom. 381 (384).

Void agreements:—The doctrine of part performance cannot be applied to void agreements, *e.g.*, an agreement to transfer a right of expectancy, which is void under sec. 6 (a). No amount of part performance can validate a void agreement—*Lalita Prasad v. Sarnam*, 14 P.L.T. 27, A.I.R. 1933 Pat. 165 (172).

CHAPTER III.

OF SALE OF IMMOVEABLE PROPERTY.

54. “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
“Sale” defined.

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
Sale how made.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.
Contract for sale.

It does not, of itself, create any interest in, or charge on, such property.

274. Applicability of section to Mahomedans:—This section applies to Mahomedans as well as to Hindus. Mahomedans have no more right to transfer immoveable property without complying with the provisions of the Transfer of Property Act than any members of the other community, and to allow them to do so would in effect be repealing the provisions of this Act so far as the Mahomedan community is concerned—*Ghafuruddin v. Hamid Husain*, 10 A.L.J. 154, 16 I.C. 679.

But some cases have laid down that for the purposes of *pre-emption*, this section need not be entirely applied to Mahomedans, so that if a sale is invalid under this section but valid under the Mahomedan Law, the pre-emptor would get a right of pre-emption. Thus, a property worth Rs. 300 can be sold only by a registered deed under the second para of this section, but under the Mahomedan law delivery of possession of the property would be sufficient to complete the sale. Therefore, if the property is orally sold and possession delivered, there would be a valid sale under the Mahomedan law, which would give rise to a right of pre-emption, though the sale is invalid under this Act—*Abdullah v. Ismail*, 46 Bom. 302, A.I.R. 1922 Bom. 124, 64 I.C. 913; *Janki v. Girjadut*, 7 All. 482 (F.B.). In considering the question of pre-emption, the rule of Mahomedan law alone is to be applied, and if the sale is valid under that law, the right of pre-emption will arise, although the sale may be incomplete under this Act—*Begum v. Muhammad Yakub*, 16 All. 344 (F.B.). But the Patna and Calcutta High Courts are

of opinion that sec. 54 of this Act abrogates the Muhammadan law of sale even in respect of pre-emption, and no right of pre-emption arises until the sale has been completed under this section by registration—*Kheyali Prasad v. Mullick Nazarul Alum*, 20 C.W.N. 1048, 1 P.L.J. 174 (177, 178), 34 I.C. 210; *Budhai v. Sonaula*, 41 Cal. 943 (949), 18 C.W.N. 890, 23 I.C. 385 (*per* Carnduff J.). The same opinion was expressed by Banerji J. in *Begum v. Md. Yakub*, 16 All. 344 (356).

If the case is governed by the Agra Pre-emption Act, a sale that is pre-emptible under that Act is a sale as defined in sec. 54, T. P. Act. A transfer of property of value more than Rs. 100, effected by a compromise decree is not a valid sale under this Act, in the absence of a registered instrument, and cannot therefore be the subject of pre-emption—*Bindraban v. Rajpat*, 53 All. 100, A.I.R. 1931 All. 741 (742), 1930 A.L.J. 1564, 131 I.C. 242, following *Paras Ram v. Neksai*, 50 All. 454, A.I.R. 1928 All. 67.

276. Transfer of ownership:—The “transfer of ownership” marks the difference between a sale and a mortgage. In a mortgage, the mortgagee holds the estate merely as a security for the debt, and not *absolutely*, and he has therefore only a qualified and limited interest in it, confined to the object of satisfying his debt, and so long as the right of redemption remains in the mortgagor, the full proprietary interest and right cannot be said to have passed from him to the mortgagee. In a sale, on the other hand, the proprietary rights pass in their full sense and absolutely—*Indar Sein v. Naubat*, 7 All. 553 (F.B.).

A *compromise* is merely an acknowledgment of the existing rights of parties. It is not a transfer of ownership, and is consequently not a sale. This section therefore does not apply; so, if the terms of a compromise affecting land worth less than Rs. 100 are reduced to writing, it is not necessary that the writing should be registered or possession given under the 3rd para of this section—*Krishna Tanhaji v. Aba Shetta*, 34 Bom. 139.

Grant of easement:—This section applies to the *transfer* of easements, and not to the *creation* thereof, because the creation of an easement (*e.g.*, a right of way) is not a *transfer of ownership*. An easement can therefore be created by a *verbal agreement*, or unregistered document; no writing or registration is necessary under this section—*Satyanarayana-murti v. Lakshmayya*, 57 M.L.J. 46, 115 I.C. 145, A.I.R. 1929 Mad. 79 (80); *Gun Sone v. Cassim Dalla*, 9 Bur.L.T. 222, 34 I.C. 95; *Sital Chandra v. Delanney*, 20 C.W.N. 1158 (1164), 34 I.C. 450. By a document A agreed that when B would build his second storey, he (B) should have a right to discharge rain water as well as water used for daily household purposes through certain spouts, and that A would take the additional burden on the servient tenement. *Held* that the right granted was an easement within the meaning of sec. 4 of the Easements Act. The deed did not transfer any portion of the grantor’s (A’s) right of ownership, and the document did not require registration—*Bhagwan Sahai v. Narasinha Sahai*, 31 All. 612.

278. Price:—“In all sales it is evident that price is an essential ingredient, and that where it is neither ascertained nor rendered ascertainable, the contract is void for incompleteness and incapable of enforcement. It is not, however, necessary that the contract should in the first instance determine the price. It may either appoint a way in which it is to be determined, or it may stipulate for a fair price”—*Fry on Specific Per-*

formance, 6th Edn. Ss. 353, 354; *Ram Sundar v. Kali Narain*, 55 Cal. 285, A.I.R. 1927 Cal. 889 (893), 104 I.C. 527.

Price means *money*—*Empress v. Appava*, 9 Mad. 141; *Volkart v. Vettivelu*, 11 Mad. 459 (at p. 467); *Samaratmal v. Govind*, 25 Bom. 696; *Madam Pillai v. Badrakali*, 45 Mad. 612 (617) (F.B.); *Abadi Begam v. Khalil*, *infra*. A sale is a transfer of ownership in exchange for *money*. If a property is transferred in exchange for something other than money, the transaction is called an *exchange*—*Talib Ali v. Kaniz Fatima*, 2 Luck. 575, 4 O.W.N. 400, A.I.R. 1927 Oudh 204 (205), 102 I.C. 142. An agreement between two persons to divide the fruits of a contemplated litigation, in which the consideration for the transaction is described as “efforts, attempts, proceedings, payment of vakils’ fees, and the danger of failure and loss” cannot be held to be a transaction of sale, because there is no *price* (i.e., money price) fixed, which is of the essence of a sale, and no amount of money is paid or promised to be paid but the whole is left in the hands of the speculators for the purpose of meeting the expenses of a litigation—*Abadi Begam v. Khalil*, 6 Luck. 282, A.I.R. 1930 Oudh 481 (495), 132 I.C. 753. The transaction does not become a sale merely because the parties are sometimes described as vendors and vendees—*Ibid*.

In order that a transaction may be a sale, the payment of some *money* or consideration must be contemplated. The creation of an *adhlapi* tenure whereby in consideration of sinking a well and clearing the land attached to it within a certain period a person was to get possession of a part of the land as proprietor, does not amount to a sale—*Ghulam Muhammad v. Tikchand*, 2 Lah. 199 (202), A.I.R. 1921 Lah. 82, 62 I.C. 932. A transfer of property partly in consideration of money and partly in consideration of a forbearance on the part of the purchaser to take certain legal proceeding is not a sale—*Venkata Jagannadha v. Venkata Kumara*, 54 Mad. 163, 60 M.L.J. 56, A.I.R. 1931 Mad. 140 (143).

A discharge of future maintenance is not a ‘price’, and therefore the transfer of property by husband to his wife for her use during her lifetime in discharge of her future maintenance is not a sale—*Madam Pillai v. Badrakali*, 45 Mad. 612 (F.B.). A transfer of property in lieu of discharge of the right of maintenance of the transferee charged on the property is not a sale but an exchange—*Rajjo v. Lajja*, 26 A.L.J. 169, A.I.R. 1928 All. 204 (205), 114 I.C. 43. In another Madras case it has been held that a transfer of property in consideration of a discharge of a debt is a transfer in exchange of a ‘price’ and amounts to a sale—*Ariyaputhira v. Muthu Kumaraswami*, 37 Mad. 123, 15 I.C. 343. But this case has been disapproved of in 45 Mad. 612 (F.B.) cited above.

Dower-debt is ‘price’, and a transfer of immoveable property by a Muhammadan in favour of his wife in lieu of dower is a sale—*Asalat v. Sambhu Dayal*, 14 O.C. 214, 11 I.C. 928; *Fahmidunnissa v. Hiralal*, 64 I.C. 126 (Nag.); *Md. Zaki Khan v. Mannu*, 28 O.C. 227, 87 I.C. 176, A.I.R. 1925 Oudh 407, 2 O.W.N. 171; *Saiful v. Abdul Aziz*, 1931 A.L.J. 951, 133 I.C. 901; *Abbas Ali v. Karim Bakhsh*, 13 C.W.N. 160, 4 I.C. 466. Where the transfer of property is made in lieu of a sum of money, whether the money is paid in cash or by the *extinction of a dower-debt*, the transaction comes within the definition of a sale in sec. 54, T. P. Act—*Md. Zaki Khan v. Mannu*, (*supra*). But see *Bashir Ahmad v. Zobaidda*, 1 Luck. 83, 29 O.C. 108, A.I.R. 1926 Oudh 186, 92 I.C. 265, and *Talib Ali v. Kaniz Fatima*, (*supra*), where such a transaction has been held to be a *hiba-bil-*

ewaz (exchange) and not a sale, (and cannot give rise to a right of pre-emption) as the word 'price' in this section means money and not the release of an obligation to pay dower-debt. But so far as the T. P. Act is concerned, it makes no difference whether the transaction is treated as a sale or an exchange, for in either case, sec. 54 applies (see sec. 118).

Where at the time of sale the property sold was not in the possession of the vendor but was held by a third party against whom a suit had to be instituted for recovery of possession, but the vendor being too poor to sue for its recovery sold the property to the purchaser for Rs. 5,000, and it was agreed that the vendor was not to get any further sum if the vendee succeeded in his suit for recovering the property, nor was the vendor liable if the suit failed, *held* that the total consideration was Rs. 5,000, neither more nor less, and the property was transferred for this cash consideration. The transaction was therefore a sale—*Badri Prasad v. Bijay Nand*, 54 All. 905, 139 I.C. 693, A.I.R. 1932 All. 685.

279. "Promised":—Conditional promise to pay price:—There is nothing contrary to public policy in providing in a deed that the payment of the consideration in a transaction amounting to a sale shall be postponed under certain events (*e.g.*, until possession is obtained within a year) and that it shall not be paid at all in the event of the property being lost or possession not being obtained. It does not thereby become a gambling transaction—*Kauleshar v. Abadi Bibi*, 37 All. 631 (633).

281. Non-payment of price:—The words 'price paid or promised' show that where a sale has been completed by execution and registration of the conveyance, the mere non-payment of the purchase-money does not prevent the passing of the title of the property sold from the vendor to the purchaser; and the vendee, notwithstanding such non-payment, can maintain a suit for possession of the property—*Shiblal v. Bhagwan*, 11 All. 244 (252); *Krishnamma v. Mali*, 43 Mad. 712, 38 M.L.J. 467, 56 I.C. 530; *Somasundaram v. Shwe Ba*, 13 Bur.L.T. 26, 57 I.C. 948; *Baijnath v. Paltu*, 30 All. 125 (127); *Umed Lal v. Davu*, 2 Bom. 547 (548); *Ramdhari v. Gorakh Rai*, 10 Pat. 264, 133 I.C. 34, A.I.R. 1931 Pat. 236; or he can maintain a suit for declaration of his proprietary right, in case the property is in the possession of other persons, *e.g.*, mortgagees—*Kesri v. Ganga*, 4 All. 168 (170).

As regards the remedy of the vendor, it has been held in some cases that he is to bring a separate suit for recovery of the purchase-money. The Court cannot, in a suit brought by the purchaser for possession, make the decree for possession conditional on the payment of the purchase-money, nor can it decree payment of the money to the vendor in the purchaser's suit—*Krishnamma v. Mali*, 43 Mad. 712 (713, 714); *Velayutha v. Govindaswamy*, 34 Mad. 543 (544); *Somasundaram v. Shwe Ba*, *supra*; *Sagaji v. Namdev*, 23 Bom. 525 (527). The grounds of this decision are, *firstly*, that it is not competent for the Court to incorporate the vendor's charge for unpaid purchase money into the decree passed in the suit brought by the purchaser for recovery of the property; and *secondly*, that as the vendor is not able to set up a counter-claim, the decree cannot incorporate the vendor's lien. But these are mere matters of convenience and procedure, rather than of substantive law, and from the point of view of convenience it has been decided in some other cases that in decreeing the purchaser's suit for possession the Court can make it subject to the condition that the

purchaser shall pay the purchase-money within a time fixed by the Court, and that on his failure to pay within the time so fixed the suit shall stand dismissed—*Baij Nath v. Paltu*, 30 All. 125 (127); *Basalingava v. Chinnava*, 30 Bom.L.R. 1064, 114 I.C. 369, A.I.R. 1929 Bom. 60 (62); *Basalingava v. Chinnava*, 56 Bom. 556, 138 I.C. 534, A.I.R. 1932 Bom. 247 (250); *Jogendra v. Manmatha*, 34 I.C. 106 (108); *Umedmal v. Davu*, 2 Bom. 547 (549); *Rama Aiyar v. Vanamamalai*, 27 I.C. 336 (337); *Nilmadhab v. Haranprosad*, 17 C.W.N. 1161, 20 I.C. 325 (327). In other words, the right of the purchaser to obtain possession and the right of the vendor to realise the unpaid purchase-money should be recognised and enforced in *one action*. If the Court gives an unconditional decree to the purchaser for possession, the vendor will be driven to institute another suit for the unpaid purchase-money. It is obviously undesirable that the matter in controversy which may be settled without disadvantage to any of the parties in a single litigation should be repeatedly agitated in a succession of suits—*Nilmadhab v. Haran Prosad*, *supra*; *Basalingava v. Chinnava*, *supra*. But the vendor has no right, on account of non-payment, to treat the sale as void and convey the property to a third person—see *Shib Lal v. Bhagwan*, 11 All. 244 (251, 252); *Kesri v. Ganga Prasad*, 4 All. 168; *Moidin v. Avaran*, 11 Mad. 263 (264). As to the vendor's charge for unpaid purchase-money, see Note 311 under sec. 55.

Where there is a registered deed of sale, which is not tainted by any fraud or the like, it passes the title and interest conveyed, notwithstanding the non-payment of purchase-money—*Chetty Firm v. Chetty Firm*, 9 Bur. L.T. 199, 34 I.C. 125 (126); *Jogendra v. Manmatha*, 34 I.C. 106 (107). The non-payment of the consideration money may be an important item to be taken into consideration in determining whether the conveyance was or was not a real transaction. But a conveyance, notwithstanding the non-payment of consideration, may be a perfectly good transaction, except where the conveyance is drawn in such a form that the transfer is conditional only upon the payment of the consideration-money—*Kumud Kamini v. Khudumani*, 47 I.C. 202 (203, 204) (Cal.); *Makhan Lal v. Hanuman*, 2 P.L.J. 168 (170), 38 I.C. 877. The true test in such a case is the intention of the parties to the transaction. If the intention is that the title should pass immediately even though the consideration has not been paid, the title passes; that is, the failure to pay the consideration for a conveyance does not defeat the conveyance, except when there is an agreement that it should take effect only if the consideration is first paid—*Nitai Chandra v. Champaklata*, 29 C.L.J. 250, 51 I.C. 104 (105). Where the sale-deed *expressly stipulates* that if the vendee omits to pay the balance of purchase-money within a specified time the deed will be treated as null and void, the vendor is entitled to avoid the deed on the vendee failing to make the payment agreed upon—*Bakhtawar v. Naushad Ali*, 55 I.C. 659 (Oudh). Refusal by the vendee to pay the price to the vendor would not by itself be a reason for setting aside the sale. Once a sale is completed, it cannot be rescinded for failure of consideration, unless that right is *expressly reserved*, in which case an action will lie not in consequence of any general right vested in the vendor but on the express covenant made in the deed. In any other case, all that the vendor could claim would be damages for breach of the promise to pay the price—*Bai Devmani v. Ravishankar*, 53 Bom. 321, 31 Bom.L.R. 109, 116 I.C. 236, A.I.R. 1929 Bom. 147 (150).

Where the vendee purchased under a registered sale-deed, but he abstained from paying the purchase-money for more than three years, and allowed his vendor to retain possession and to sell the land to other persons, *held* that the vendee was not thereafter entitled to bring a suit for possession—*Sangu v. Cumarasami*, 18 Mad. 61 (63). Where the sale-deed was registered and possession delivered to the vendee, but no consideration was paid (although it was expressed in the sale-deed to have been paid) and it was found that the vendor was forced to execute the deed during his illness under undue influence, *held* that the vendor was entitled to have the sale-deed cancelled and possession restored—*Tatia v. Balaji*, 22 Bom. 176. Where the parties enter into a bargain for the sale of property, then if the real intention is that the property should pass, the mere fact of non-payment of part or even the whole of the consideration will not make the deed of transfer fictitious. But the non-passing of the consideration may often be a very strong evidence that the conveyance is not a real transaction and that the deed was not intended to operate. Each case must be decided upon the facts proved—*Alamdar v. Moti Ram*, 16 A.L.J. 454, 46 I.C. 382. Where the fact found is that a portion of the consideration set out in a sale-deed has been found to be good consideration, the mere fact that another portion of the consideration has not been paid is no ground for coming to the conclusion that the parties did not intend the document to be enforceable between them—*Muniram v. Amjad Ali*, 26 A.L.J. 539, A.I.R. 1928 All. 391 (392), 114 I.C. 192.

If no price is paid or even *promised*, there is no sale and the transfer does not take effect, because the essence of sale is exchange of property for a price *paid* or *promised*. Where the price was not paid, and the purchaser never promised to pay it, even a registered conveyance cannot effect a sale—*Maung Saing v. Shwe Lon*, 4 L.B.R. 369.

282. Proof of payment of price:—Notwithstanding an admission in a sale-deed that consideration has passed, the vendor can prove that no consideration has in fact been paid—*Sah Lal v. Indrajit*, 22 All. 370 (P.C.). In such cases, the party (vendor) who alleges non-payment of consideration is ordinarily bound to prove his allegation; and the mere denial by the vendor of the receipt of consideration acknowledged in the recitals of the deed of sale is not in all cases sufficient to cast upon the vendee the burden of proving payment of consideration, especially where the vendee has been put in possession of the property and of the title-deeds—*Rampal v. Suba Singh*, 4 P.L.J. 517, 53 I.C. 83. But where possession has never been transferred after the sale, and the vendee has silently submitted to the withholding of possession for several years, the Court will presume that possession has been withheld for non-payment of consideration, and it will be incumbent on the vendee to give evidence that the consideration has in fact passed and to account for his being out of possession of the property since his purchase—*Achobandil v. Mahabir*, 8 All. 641.

284. Tangible immoveable property:—An undivided share in immoveable property is a tangible immoveable property—*Peari Lal v. Lala*, 14 O.C. 161, 11 I.C. 673; *Maung Hoe v. Pe Hla*, 3 Bur.L.J. 63, A.I.R. 1924 Rang. 267, 83 I.C. 270.

As to what is an 'immoveable property' see Notes 17 and 18 under sec. 3.

285. Intangible property:—An intangible property can be sold

only by a registered deed (para. 2), irrespective of value. The following have been held to be intangible property:—

(1) Equity of redemption in property usufructuarily mortgaged is *intangible* and not *tangible* property, because possession thereof cannot be given to the purchaser—*Ramaswami v. Chinnan*, 24 Mad. 449 (463); *Rahmat Ali v. Muhammad*, 11 A.L.J. 407, 19 I.C. 818 (820); *Jairam v. Balkrishnadas*, 3 N.L.R. 72; *Sheikh Hashmat v. Sheikh Jamir*, 23 C.W.N. 513 (514), 52 I.C. 558; *Mahendra v. Chandrapal*, 24 O.C. 155, 63 I.C. 284. So also, the equity of redemption in case of a *katkobala* is intangible property—*Ramnarin v. Kula Chandra*, 49 I.C. 426 (Cal.). But the equity of redemption in the case of a *simple* mortgage is *tangible* immoveable property—*Ramasami v. Chinnan Asari*, 24 Mad. 449 (463). But a Full Bench of the Allahabad High Court has recently laid down that there is no such thing as “equity of redemption” in India, and that the Indian legislature has purposely refused to import that expression of English law into the Indian Acts. A mortgagor, who after mortgaging the property, sells the so-called “equity of redemption”, sells the *property* itself (and not merely an abstract right), which is *tangible* immoveable property and not intangible property, even though the mortgage is usufructuary; consequently, if the value is less than Rs. 100, the sale can be made by mere delivery (para. 3)—*Sohan Lal v. Mohan Lal*, 50 All. 986 (F.B.), 26 A.L.J. 1084, A.I.R. 1928 All. 726 (729, 732), 118 I.C. 177.

(2) Contingent interest—*Subrahmanian v. Perumal*, 18 Mad. 454 (455); *Peari Lal v. Lala*, 14 O.C. 161, 11 I.C. 673.

(3) Right of a simple mortgagee in the property mortgaged—*Ramaswami v. Chinnan*, 24 Mad. 449 (463) (dissenting from *Subramanian v. Perumal*, 18 Mad. 454); *Balagurumoorthy v. Nagulu*, 41 M.L.J. 267, A.I.R. 1921 Mad. 277, 69 I.C. 473; *Mutsaddi Lal v. Muhammad Hanif*, 10 A.L.J. 167, 15 I.C. 853 (854).

(4) Reversion—*Bhaskar v. Padman*, 40 Bom. 313, 33 I.C. 267; *Damodar v. Girdhari*, 27 All. 564. An “intangible thing” being in the nature of a reversion, a debt which has already become due from a third person (*e.g.*, profits already due from a *lambardar* to a co-sharer) is not included in the term. An assignment of such a debt does not require to be registered—*Damodar v. Girdhari*, 27 All. 564.

(5) The right of cutting and appropriating “plants now standing or that may hereafter form” on certain land—*Kuthuva v. Thoppai*, 15 I.C. 234 (Mad.).

286. Mode of transfer:—Paras 2 and 3 lay down the effectual modes of transferring property by sale, and no transfer can be effected otherwise than by complying with the provisions of these paras. The *mutation* of names in the Revenue papers or a statement made before the Revenue officer in a mutation proceeding is not a sufficient compliance with the provisions of this section—*Ram Prasad v. Bedo*, 13 I.C. 436 (All.); *Ram Sarup v. Charitter*, A.I.R. 1927 All. 338 (339), 100 I.C. 270. So also, a title to land cannot pass by a mere *admission* when the statute requires a deed—*Mathura Mohan v. Ramkumar*, 43 Cal. 790.

287. Para 2—Registration:—In enacting this section, it was the intention of the Legislature, by means of compulsory registration, to minimise, as far as possible, the chances of litigation and to reduce the opportunities for perjury in connection with sales of immoveable property—*Kurri Veerareddi v. Kurri Bapireddi*, 29 Mad. 336 (344) (F.B.).

The T. P. Act does not apply to Punjab, where a transfer of immoveable property of value of Rs. 100 or upwards can be made orally—*Udho Das v. Meher*, 34 P.L.R. 714, A.I.R. 1933 Lah. 262 (263):

Effect of registration—Transfer of title:—The mere registration of a sale-deed does not necessarily amount to a transfer of property to the vendee, especially if there is no delivery of the deed—*Jogendra v. Manmatha*, 34 I.C. 106 (107) (Cal.). Where neither the deed of sale nor possession of the property was delivered to the vendee and no consideration passed, the mere registration of the deed of sale did not operate to pass the title to the vendee—*Raju Mahton v. Hassain Mean*, 59 I.C. 171 (Pat.); *Sree Nath v. Sree Kanta*, 6 I.C. 477 (478) (Cal.). The mere registration of the deed does not necessarily pass the property. Apart from the section, registration is not a formality which creates any rights, although it affects the admissibility in evidence of the document registered. Registration is *prima facie* proof of intention to transfer the title but it is not proof of *operative* transfer; and if there is a condition precedent as to payment of consideration and the delivery of the deed, such condition must be strictly fulfilled before title can pass—*Sheo Narain v. Darbari*, 2 C.W.N. 207 (208). The mere registration of a deed of transfer is not in itself sufficient to convey title, but the Court has to see what was the *intention* of the vendor, if no consideration passed. The intention may be presumed from circumstances—*Gostho Behary v. Rohini*, 13 C.W.N. 692, 4 I.C. 541. If it was intended by the parties that the title should pass only upon the consideration-money being paid, then the mere registration will not be taken as conclusive that the title has passed; and no title will pass unless the consideration money has been paid—*Mauladan v. Raghunandan*, 27 Cal. 7; *Gostho Behary v. Rohini*, 13 C.W.N. 692 (693), 4 I.C. 541; *Seramot v. Samad Ali*, 19 I.C. 562; *Abdul Aziz v. Kala Shah*, 50 P.W.R. 1916, 32 I.C. 961; *Sree Nath v. Sree Kanta*, 6 I.C. 477 (478); *Kumud Kamini v. Khudumani*, 47 I.C. 202 (204); *Makhan Lal v. Hanuman*, 2 P.L.J. 168 (170), 38 I.C. 877; *Maung Mon v. Ma Kin*, 5 Rang. 636, A.I.R. 1928 Rang. 47, 106 I.C. 358. If, on the other hand, it is proved that a deed of sale was intended to be operative upon registration, and there was no intention of either party to postpone the operation of the conveyance till the consideration was paid, the deed does not become inoperative by reason merely of non-payment of the purchase-money—*Nilmadhab v. Haran Prosad*, 17 C.W.N. 1161, 20 I.C. 325 (326); *Seramot Ali v. Samad Ali*, 19 I.C. 562; *Umedmal v. Davu*, 2 Bom. 547 (548). See also Note 281 above, "Non-payment of price." Similarly, if it was intended by the owner, whether consideration passed or not, to transfer the property to the defendant who was his mistress, *held* that the registration of the sale deed would be sufficient to transfer the title and no proof of payment of consideration was necessary—*Gostho Behary v. Rohini Gowalini*, 13 C.W.N. 692 (693), 4 I.C. 541.

Two persons entered into a transaction which they embodied in a deed of sale; the deed was described as a contract of sale, but it was registered and it distinctly provided that on certain events happening the property should be regarded as sold to the vendee. The vendee was put in possession of the property in consequence of the registered deed. *Held* that there was a transfer in consequence and by operation of the registered deed when the conditions of the deed were fulfilled—*Kundu Konhuji v. Vishnu*, 37 Bom. 53, 17 I.C. 176 (177).

No title before registration:—Where the sale-deed requires registration (*e.g.*, in the case of immovable property worth Rs. 100 or upwards) the title does not pass until the sale deed has been registered (2 C.W.N. 207), though there may be transfer of possession and payment of consideration. Therefore, if property is sold to A under a sale deed executed on the 11th August but the sale-deed is registered on the 25th November, and in the meantime the property is sold in execution of a decree against the vendor on the 7th November and is purchased by B, B's title will take precedence over that of A, and he will be entitled to possession by ousting A—*Tilakdhari v. Gour Narain*, 5 P.L.J. 715 (718), 59 I.C. 290.

288. Absence of sale-deed:—Where there is no deed whatsoever in respect of property above Rs. 100 in value, but merely an *oral contract* for sale, it does not amount to a sale of the property, even though possession has been delivered to the vendee and he has paid a portion of the purchase-money. The possession by the vendee cannot take the place of the registered deed required by this section. The property does not vest in him until there is a registered deed. Consequently the vendor can recover possession from the vendee, with mesne profits—*Papireddi v. Narasareddi*, 16 Mad. 464 (465). But now see sec. 53A which enunciates the doctrine of part performance.

Non-registration of deed of conveyance—Part performance:—See sec. 53A and notes thereunder.

289. Evidentiary value of unregistered deed:—In section 49 of the Registration Act, a proviso has been newly added (by the T. P. Amendment Supplementary Act, XXI of 1929) to the effect, that “an unregistered document affecting immovable property and required by this Act or by the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance under Ch. II of the Specific Relief Act, or as evidence of part performance of a contract for the purposes of sec. 53A of the Transfer of Property Act, or as evidence of any collateral transaction not required to be effected by a registered instrument.” This proviso supersedes *Thayarammal v. Lakshmi Ammal*, 43 Mad. 822 (823) where it was held that it was not open to the vendee to treat the unregistered deed as an agreement to sell and to sue for specific performance of such agreement.

290. Para 3:—Para. 3 dispenses with the necessity of registered conveyances in cases of immovable property valued at less than Rs. 100 “It was thought that in the absence of a much larger number of registration offices than at present exist in India, the requirement of registration in the case of every petty transaction relating to land would have been an intolerable hardship”—Whitley Stokes’ *Anglo Indian Codes*, Vol. I, p. 729 (footnote).

By virtue of the amendment of section 4 by the Amendment Act of 1885, para 3 of section 54 is rendered absolute in so far as it prescribes that a sale of tangible immovable property of value less than Rs. 100 can be made only by a registered instrument or by delivery of the property; if it is made otherwise, *e.g.*, by an unregistered instrument unaccompanied by delivery of possession, the sale is inoperative and confers no title on the vendee—*Makhan Lal v. Banku*, 19 Cal. 623, F.B. (overruling *Khatu Bibi v. Madhuran*, 16 Cal. 622); *Konormal v. Nabin*, 15 I.C. 228. See Notes under sec. 4,

An unregistered sale of property under Rs. 100 in value, without delivery of possession gives no title to the vendee; consequently, if the same property is afterwards sold to another person under a registered sale-deed, the latter person gets the property in preference to the former, even though the latter purchaser had notice of the prior sale; for the doctrine of notice cannot be invoked to give validity to an invalid title. The contrary view taken in *Shivram v. Genu*, 6 Bom. 515, *Hathisingh v. Kuvarji*, 10 Bom. 105, *Fazluddin v. Fakir Mahomed*, 5 Cal. 336, *Bhalu v. Jakhu*, 11 Cal. 667 and other cases is no longer good law, as these cases were decided before the amendment of sec. 4, when an unregistered deed without possession gave a good title.

If there is delivery of possession, it is sufficient to transfer the ownership; and the fact that there is also an unregistered sale-deed will not weaken or destroy the effect of the delivery of possession—*Bhagabati v. Sashi*, 2 I.C. 413; *Ganga v. Kalicharan*, 22 Cal. 179; *Gulab v. Laltu*, 22 O.C. 58, 51 I.C. 561; *Daya Ram v. Sita Ram*, 79 I.C. 394, A.I.R. 1925 All. 206; *Narasimha v. Bhupati Raju*, 29 M.L.J. 721, 31 I.C. 52. The mere existence of an unregistered instrument does not prevent the vendee from falling back upon his title by delivery of the property—*Rupa Teli v. Bishambar Teli*, 8 C.P.L.R. 1; *Shambhubai v. Shiblaldas*, 4 Bom. 89; *Hriday Behari v. Ram Rani*, 3 O.L.J. 460, 37 I.C. 20. But in a Madras case it has been held that if the purchaser relies on an oral sale accompanied by delivery of possession, as well as on an unregistered document of sale, it is the document which must be looked to, and as that document is unregistered, there is no valid sale at all. If there had been no document, and the parties would have been satisfied by mere delivery of property, then the transaction would have been a sale by delivery of property, and therefore valid. But if the parties, not satisfied with mere delivery, reduce the transaction to writing, it is the writing that must be regarded as containing the terms of the contract, and the sale can hardly be called a sale by delivery. And the writing being unregistered, the sale is invalid—*Kuppuswami v. Chinnaswami*, 28 L.W. 234, A.I.R. 1928 Mad. 546 (548), 111 I.C. 677. This case has been dissented from in *Keshwar v. Sheonandan*, cited below.

Evidentiary value of the unregistered instrument:—An unregistered sale-deed of immoveable property worth less than Rs. 100, though inoperative under this section, where delivery of possession has not been made to the vendee, is admissible in evidence to prove the contract of sale—*Poomalai v. Karuppa*, (1916) 2 M.W.N. 136, 34 I.C. 921; *Narasimha v. Raghunanda*, 29 M.L.J. 721, 31 I.C. 52; it may be used, under sec. 91 of the Evidence Act, to prove the nature and the terms of the transaction which fell through—*Brajabullav v. Akhoy*, 30 C.W.N. 254, A.I.R. 1926 Cal. 705, 93 I.C. 115. Where the sale was effected by delivery of possession, and there was also a deed of sale which was not registered, *held* that though the unregistered document did not by itself confer title, and could not be used to prove that title passed under it, still it would be admissible as evidence, under sec. 91, Evidence Act, of the nature and terms of the transaction—*Keshwar v. Sheonandan*, 10 P.L.T. 449, 122 I.C. 533, A.I.R. 1929 Pat. 620 (621); *Sheikh Juman v. Mahomed Nobineoaz*, 21 C.W.N. 1149, 41 I.C. 779; and can be used in evidence for determining the identity or dimensions of the plot sold—*Harsalsa v. Bapu*, 18 N.L.R. 8, 56 I.C. 382. See Note 289 ante.

291. Possession versus registration:—A sale of immoveable property worth less than Rs. 100, under an unregistered instrument, but accompanied by delivery of possession, undoubtedly confers a good title on the purchaser (see above); but the question arises, whether such purchaser will be entitled to hold his title as against a subsequent purchaser of the same property under a *registered instrument*. Under sec. 50 of the Registration Act, all registered deeds take priority over unregistered deeds in respect of the same property, whether registration in respect of such property is compulsory or not; and since that section says nothing about *possession*, it was held in some cases that a purchaser under an unregistered instrument though he had obtained possession was liable to be defeated by a subsequent purchaser under a registered document (who had no notice of the prior sale)—*Fuzluddin v. Fakir Mahomed*, 5 Cal. 336; *Bimara v. Papaya*, 3 Mad. 46; *Moreshwar v. Datta*, 12 Bom. 569; *Kondaya v. Guruvappa*, 5 Mad. 139. In these cases, possession of the prior purchaser was held not to be equivalent to *notice*. In some other cases the High Courts have taken the more rational view that sec. 50 of the Registration Act must be read subject to the equitable doctrine of *notice*, although it has not been expressly mentioned therein, and that the possession of the prior purchaser must be taken as equivalent to *notice*, with the result that the subsequent purchaser under a registered deed will be defeated by the prior unregistered purchaser with possession—*Nani Bibee v. Hafizullah*, 10 Cal. 1073 (1075); *Krishnamma v. Suranna*, 16 Mad. 148 (F.B.); *Dinonath v. Auluckmoni*, 7 Cal. 753; *Sharfuddin v. Govind*, 27 Bom. 452; *Dundaya v. Chenbasappa*, 9 Bom. 427.

This conflict of opinion has now been removed by Explanation II (newly added by the Amendment Act of 1929) in the definition of 'notice' given in section 3. Under that Explanation, possession amounts to notice; consequently, the possession of the prior purchaser will avail as against a subsequent registered purchaser, on the equitable doctrine of notice. See Note 28 under sec. 3.

Where the prior purchaser acquires by a registered deed, and the property is subsequently sold to another by delivery of possession, the former takes the property and the latter gets nothing, since the vendor having already disposed of his right, title and interest to the first purchaser, there remains no residue for him to sell to the second vendee.

292. Delivery of possession:—Under para. 4 of this section, if there is no registered deed, the sale must be effected by delivery of possession. Delivery of tangible immoveable property takes place when the seller places the buyer or such person as he directs, in possession of the property. The essence of the transfer is that possession is changed. What was in the occupation of the vendor ceases to continue in his occupation, by reason of the transfer, the possession being transferred to the vendee—*Sibendrapada v. Secretary of State*, 34 Cal. 207.

Delivery of possession may be actual or constructive. In many cases *actual* physical delivery of property is impossible (as for instance, where the property sold is in the possession of tenants or lessees); in such cases delivery of title-deeds is sufficient—*Man Bhari v. Naunidh*, 4 All. 40; *Kattayani v. Narayana*, 9 Mad. 267. Where the land is in the occupation of tenants, a notice to them by the vendor to pay rents henceforth to the purchaser is sufficient constructive delivery of possession—*Kattayani v. Narayana*, *supra*. But where the property is capable of physical possession,

there must be real delivery of the property; any sort of constructive possession is not sufficient—*Sarju v. Tulsi*, A.I.R. 1926 Nag. 93, 91 I.C. 1018.

If, in consequence of the sale, the purchaser enters into possession, there is sufficient delivery of the property and it is unnecessary that there should be any formal making over of possession by the vendor—*Gunga Narain v. Kalicharan*, 22 Cal. 179; *Ummar v. Vythilinga*, 5 M.L.T. 263, 4 I.C. 1135. Where the vendee had been in possession of the property from *before* the date of sale, it was held in earlier Calcutta cases that there could be no formal delivery of possession, and therefore the sale must be effected by a registered instrument; otherwise it would be invalid—*Tilak v. Rudeswar*, 41 I.C. 8 (Cal.); *Sibendrapada v. Secretary of State*, 34 Cal. 207; *Mrinalini v. Mohima*, 6 I.C. 763 (following 34 Cal. 207). This view was followed in an Allahabad case—*Sohan Lal v. Mohan Lal*, 50 All. 986 (F.B.), 26 A.L.J. 1084, 118 I.C. 177, A.I.R. 1928 All. 726 (728). The correctness of these decisions may be doubted. Their effect is to make registration compulsory in case of sale of property worth less than Rs. 100 to persons already in possession. This view has been dissented from in *Sheikh Dawood v. Moideen*, 48 M.L.J. 264, 87 I.C. 331, A.I.R. 1925 Mad. 566, *Thakurdas v. Sobhagchand*, 12 N.L.R. 3, 32 I.C. 233, *Dinanath v. Manbadhi*, 12 N.L.R. 139, 36 I.C. 547; *Ram Nath v. Gajadhar*, 92 I.C. 478, A.I.R. 1926 All. 300, and *Muthi Karuppan v. Muthusamban*, 38 Mad. 1158 (1160), where it has been held that delivery means such delivery as the thing to be delivered is capable of, and that even where the purchaser is already in possession (*e.g.*, as tenant or mortgagee) there can still be a formal delivery of possession within the meaning of this clause, if the vendor by appropriate acts and declarations converts the position of the tenant or mortgagee into that of a purchaser. These rulings have now been followed by the Calcutta High Court (correcting its earlier view)—*Kula Chandra v. Jogendra*, 60 Cal. 384, 144 I.C. 155, A.I.R. 1933 Cal. 411 (412). And so, where property of value less than Rs. 100 which had been already mortgaged with possession was sold to the mortgagee, and possession was delivered by pointing out boundaries, by endorsing on the back of the mortgage-bond the fact of sale, and by handing it over to the mortgagee, these acts amounted to formal delivery of possession within the meaning of this section, and the sale was validly effected—*Sonai Chutia v. Sonaram Chutia*, 20 C.W.N. 195 (196), 34 I.C. 692. Where a property which is the subject of a usufructuary mortgage is sold to the mortgagee in discharge of the mortgage, a direction by the vendor to the vendee to keep the property as absolute owner amounts to delivery of possession—*Sheikh Dawood v. Moideen Batcha Saheb*, 48 M.L.J. 264, A.I.R. 1925 Mad. 566, 87 I.C. 331.

294. Contract of sale—Contract creates no interest or charge:—

The last para of this section lays down the principle of Indian law that title in property can be transferred only by a conveyance and not by mere agreement between the parties—*Raja Bhupendra v. Rajeswar*, 32 C.W.N. 16 (25), 55 Cal. 35, A.I.R. 1927 Cal. 956, 106 I.C. 117. This para makes a departure from the English law in that it declares that a contract of sale does not of itself create any interest in or charge on the property. Under the English law, the purchaser by virtue of the contract of sale becomes in equity the owner of the property from the date of the contract. See Sugden's *Vendors and Purchasers*, (14th Ed.), p. 186;

Walsh v. Lonsdale, 21 Ch. D. 9. This principle of English law has no application to places where the Transfer of Property Act is in force—*Maung Shwe v. Maung Inn*, 44 Cal. 542 (P.C.), 21 C.W.N. 500, 38 I.C. 938; *Dayabhai v. Maharaj Bahadur*, 1 P.L.J. 238 (246), 34 I.C. 482. (It should be noted that prior to the T. P. Act a contract for the sale of immoveable property created an equitable interest in the land and made the purchaser the owner in equity. See *Dinkarrao v. Narayan*, 47 Bom. 191, at p. 215).

On the analogy of the principle of this clause, a contract of pre-emption creates no interest in the immoveable property—*Basdeo v. Jhugru*, 46 All. 333 (338, 340); *Dinkarrao v. Narayan*, 47 Bom. 191 (204).

A document purporting to be a contract of sale which, after reciting the receipt of some earnest money, provided that within two months the vendor would execute a proper conveyance and thereupon receive the balance of the purchase-money and give up possession of the property sold, would not pass any right or interest to the purchaser but only give him a right against the vendor to call for a conveyance and possession on paying the balance of the purchase-money—*Harmasji v. Keshav Parshotam*, 18 Bom. 13; *Mahadeo v. Vasudev*, 23 Bom. 181. A mere agreement of sale under which a small portion of the purchase money is paid, but which is not followed by delivery of possession or a registered sale-deed, does not convey any legal title to the purchaser, and therefore he cannot convey any title to others even by a registered conveyance—*Mg. Po v. Mg. Tet*, 2 Rang. 459, 86 I.C. 205, A.I.R. 1925 Rang. 68. When a mortgagee has contracted to sell the mortgage-debt to another person and the latter has paid some consideration, but the deed of sale has not been completed, no title passes to the intended transferee, and he cannot sue on the mortgage-bond. Nor does the vendor stand in the position of a benamidar for the intended transferee—*Biswambar v. Nilambar*, 33 C.W.N. 997 (999), A.I.R. 1930 Cal. 263, 125 I.C. 861. But if the contract of sale is followed by delivery of possession and payment of purchase-money, then, though there is no registered conveyance, the transaction is more than a mere contract, and the last para of sec. 54 cannot apply. In such a case the vendor cannot say that the vendee has obtained no interest in the property. Nor can the property be attached as the property of the vendor, in execution of a decree against the vendor—*Ram Baksh v. Mughlani*, 26 All. 266 (269, 270); *Karalia v. Mansukhram*, 24 Bom. 400 (402).

The vendee's remedy in a contract of sale is a suit to enforce specific performance of the contract not only against the vendor but also against a transferee from the vendor with notice of the contract—*Ramasami v. Chinnan*, 24 Mad. 449; *Mahadeo v. Vasudev*, 23 Bom. 181; *Pancham Lal v. Kishore*, 1887 A.W.N. 15; *Gangaram v. Laxman*, 40 Bom. 498. If the vendor dies without completing the contract for sale, the claim for specific performance can be enforced against his heir. If the vendor gives away the property to somebody else by a will, and then agrees to sell it but dies before completing the sale, the contract can be specifically enforced against the devisee—*Gangaram v. Sakharam*, 22 Bom.L.R. 1396, 59 I.C. 796.

A mere contract of sale does not give rise to a right of pre-emption; such right can arise only upon a completed sale—*Tukaram v. Ukarda*, A.I.R. 1924 Nag. 327, 76 I.C. 374.

A contract for sale of immoveable property does not require to be registered, even though the value of the property or the amount of earnest

money is Rs. 100 or upwards. See the new Explanation to sec. 17, Registration Act, added by the Indian Registration Amendment Act, II of 1927, which supersedes the Privy Council decision in *Dayal Singh v. Indar*, 31 C.W.N. 125 (P.C.), 53 I.A. 214, 98 I.C. 508, A.I.R. 1926 P.C. 94.

295. Sale to minor:—The Madras High Court was once of opinion that the Privy Council decision of *Mohari Bibi v. Dharmadas Ghosh*, 30 Cal. 539, declaring contracts by minors void, applied also to sales of immoveable property to minors; and hence such sales are wholly void—*Navakoti Narayana v. Loyalinga Chetty*, 33 Mad. 312, 19 M.L.J. 752, 4 I.C. 383 (384). But this decision has been overruled by the Full Bench case of *Raghava Chariar v. Srinivasa*, 40 Mad. 308 (313) where it has been held that the Privy Council decision in 30 Cal. 539 which was a case of transfer by a minor should not be applied to a transfer made in favour of a minor, and that a transfer of immoveable property may be made in favour of a minor by way of sale, mortgage or gift, just as a minor may inherit an immoveable property; and that there is no provision in the T. P. Act under which the minor is incapable of being a transferee of property. Sec. 7 which speaks of “persons competent to contract” applies to *transferors* and not to *transferees*. The Allahabad High Court taking the same view, likewise holds that a sale executed in favour of a minor is valid, and the minor is competent to sue for possession of the property conveyed thereby—*Munni Kunwar v. Madan Gopal*, 38 All. 62 (69), 13 A.L.J. 1084; *Narain Das v. Dhania*, 38 All. 154 (160); *Ulfat Rai v. Gouri*, 33 All. 657. See also *Muniya v. Perumal*, 24 M.L.J. 352 (disapproving 33 Mad. 312).

296. Sale by Official Receiver:—A sale by an Official Receiver in Insolvency is not exempt from the provisions of this Act, and a duly registered conveyance by the Official Receiver is necessary to pass title to the auction-purchaser—*Abdul Hashim v. Amar Krishna*, 46 Cal. 887, 53 I.C. 121.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:—

Rights and liabilities
of buyer and seller.

(1) The seller is bound—

- (a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;
- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;
- (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

- (*d*) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;
- (*e*) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents;
- (*f*) to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits;
- (*g*) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same:

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered, or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such and may be enforced by every person in whom that interest is, for the whole or any part thereof, from time to time, vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that (*a*), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (*b*), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But, in case (*a*), the seller, and in case (*b*), the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents, and furnish such true

copies thereof or extracts therefrom as he may require; and, in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

- (a) to the rents and profits of the property till the ownership thereof passes to the buyer;
- (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer, *any transferee without consideration or any transferee with notice of the non-payment*, for the amount of the purchase-money or any part thereof remaining unpaid, and for interest on such amount or part *from the date on which possession has been delivered*.

(5) The buyer is bound—

- (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware and which materially increases the value of such interest;
- (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs, provided that, where the property is sold free from incumbrances, the buyer may retain, out of the purchase-money, the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;
- (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury, or decrease in value of the property not caused by the seller;
- (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

- (a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;
- (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, * * *, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery, and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract, or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph 1, clause (a), and paragraph 5, clause (a), is fraudulent.

Amendment:—In clause (1) (a) and clause (4) (b) the italicised words have been added, and in clause (6) (b) the words “with notice of the payment” have been omitted, by sec. 17 of the Transfer of Property Amendment Act, XX of 1929. The reasons have been stated in proper places.

297. Contract to the contrary:—The words “in the absence of any contract to the contrary” show that the operation of this section can be excluded by any contract or agreement or covenant between the vendor and the purchaser—*Webb v. Macpherson*, 31 Cal. 57 (71, 72) (P.C.). Thus, where the vendee stipulates that he will pay the purchase-money before the registering officer, he will not be bound to pay the purchase-money at the time of completing the sale in accordance with clause (5) (b) of this section—*Vythinatha v. Bheemachariar*, 8 I.C. 804. So also, the duty of the vendor to produce his title-deeds for examination as provided in clause 1 (b) may be superseded by a stipulation between the parties dispensing with their production—*Re Johnson and Tustin*, 30 Ch. D. 42. The seller is bound under clause (2) of this section to give to his purchaser a title free from reasonable doubt. But the purchaser may relieve the vendor of this obligation by a special contract to the contrary and may choose to take such title as the vendor can give—*Ghousiah Begum v. Rustumjah*, 13 Mad. 158 (163).

(But in order to enable the parties to evade the operation of this section it is necessary that the “contract to the contrary” must be indicated by clear and unambiguous expressions—*Mahomed Ali v. Budharam*, 39 M.L.J. 449, 60 I.C. 235 (236). “When a vendor sells property under stipulations which are against common right and place the purchaser in a position less advantageous than that in which he otherwise would be,

it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself"—*per* Knight Bruce, V.C. in *Seaton v. Mapp*, 2 Coll. 556 (562); followed in *Motivahoo v. Vinayak*, 12 Bom. 1 (17). Moreover, in order to evade the operation of this section, the contract must be contrary to (*i.e.*, inconsistent with) its provisions. Thus, where a conveyance was made in consideration of a sum of money a portion of which was paid and the balance was expressed to be payable with interest in annual instalments, for which the purchaser executed an agreement, it was held that the agreement was not inconsistent with the creation of a charge under clause (4) (b), and that the vendor was entitled to a charge for the balance of purchase-money in spite of the agreement—*Webb v. Macpherson*, 31 Cal. 57 (72, 73) (P.C.). See also notes under clause (2) *infra*.

The "contract to the contrary" need not be express and may be implied from the terms of the sale-deed. But in order to exclude the operation of the statutory liability of the vendor imposed by this section, the contract, covenant or agreement must so clearly be inconsistent with the rules of this section as to lead to the inference that it has been made to qualify the generality of its provisions. Moreover the contract will be construed favourably to the purchaser. Thus, where the vendors agreed that "if any partner or co-sharer of ours should arise and make a claim, and the whole or part of the property sold goes out of the possession of the vendor, the vendee will be entitled to recover the amounts from our persons and property of every kind", and the vendee was dispossessed by a reversioner of the widow from whom the vendor had purchased the property, *held* that the clause in the sale-deed was not exhaustive of the contingencies under which the vendee would be entitled to recover the sale price, and the event which happened in this case entitled the vendee to a refund of the sale-consideration—*Nand Ram v. Purshotam*, 1933 A.L.J. 201, 145 I.C. 615, A.I.R. 1933 All. 203 (205).

In order that the "contract to the contrary" made by the parties should oust an implied contract contained in this section, the two contracts must relate to the same subject-matter—*Balagurumurthy v. Nagulu Chetty*, 41 M.L.J. 267, 69 I.C. 473.

298. Clause (1) (a)—Seller is bound to disclose material defects:—The seller is in duty bound to inform the purchaser of any material defect in the property of which the seller is, but the purchaser is not, cognizant, and which the purchaser could not have himself discovered. In other words, the law makes a distinction between *latent* and *patent* defects. Patent defects are those defects which may be discovered by ordinary vigilance on the part of the purchaser, and such defects need not be pointed out by the vendor. Thus, the existence of an open footpath over the property—(*Keats v. Earl of Cadogan*, 10 C.B. 591; *Ashburner v. Sewell*, [1891] 3 Ch. 405) or the ruinous state of the buildings is an instance of patent defect which the purchaser might have found out by the exercise of ordinary diligence. But a vendor is bound to disclose all *latent* defects known to him, even though he may have stipulated to sell the property *with all faults*—*Schmider v. Heath*, 3 Camp. 506. Latent defects are such as the greatest attention would not enable the purchaser to discover—Sugden's *Vendors and Purchasers*, p. 333.

The seller is bound to disclose only *material* defects, *i.e.*, those defects which are of such a nature that it might be reasonably supposed that if the buyer had been aware of it he might not have entered into the contract—*Flight v. Booth*, (1834) 1 Bing. N.C. 370, 41 R.R. 599. But the seller is not bound to disclose defects of a *trifling* nature, *e.g.*, the rottenness of some boards or joists or broken panes of glass—*Dart's Vendors and Purchasers*, 7th Edn., p. 1082.

According to the last para of this section, if the seller does not disclose to his buyer any material defect in the property of which he is aware and of which the buyer is not aware and which he could not discover with ordinary care, the omission is said to be fraudulent; but if the seller himself had no knowledge of the defect, the case does not fall within this section—*Nursing Das v. Chutto Lall*, 50 Cal. 615 (623), 74 I.C. 996, A.I.R. 1923 Cal. 641.

Defects in title:—The words 'material defects' include *defects in title*—*Haji v. Dayabhai*, 20 Bom. 522. This is now made clear by the addition of the words "or in the seller's title thereto." The *Special Committee* observes:—"Sub-clause (a) of clause (1) of section 55 provides that a seller is bound to disclose to the buyer any material defect in the property of which the seller is aware. The expression 'material defect in the property' has been held to include a defect in the title of the seller. (I.L.R., 20 Bom. 522). We propose to give effect to the decision by inserting the words 'or in the seller's title thereto' in sub-clause (1)." An omission to disclose flaws in the title which the purchaser has no apparent means of discovering will be fraudulent under this section, and the vendee will be entitled to get a refund of the purchase-money—*Haji Essa Sulleman v. Dayabhai*, 20 Bom. 522 (529); *Sheo Ram v. Thakur Mahto*, 58 I.C. 529 (530) (Pat.); *Mahomed Siddiq v. Li Kan*, 4 Bur.L.J. 154, 92 I.C. 766, A.I.R. 1925 Rang. 372 (373). "The same rule applies to incumbrances and defects in the title as to defects in the estate itself. The vendor is bound to deliver to the purchaser the instrument by which the incumbrances were created or on which the defects arise, or to acquaint him with the facts if they do not appear in the title-deeds. If a seller knows and conceals a fact material to the title, relief cannot be refused to the purchaser"—*Sugden's Vendors and Purchasers*, (14th Ed.), p. 5 (cited in 20 Bom. 522, 529). Thus, where the vendor concealed the existence of a decree for partition on the house conveyed, and the purchaser was ejected by a coparcener of the vendor under the decree, *held* that the non-disclosure of the decree amounted to fraudulent concealment, and the vendor was bound to refund the purchase-money to the vendee—*Gajapathi v. Alagia*, 9 Mad. 89 (91). On a sale of a lease containing unusual and onerous covenants it is the duty of the vendor, before the contract is made, to disclose the existence of the covenants to a purchaser ignorant of them. If he does not give the purchaser express notice of the covenants, he must show that he gave him such an opportunity of acquainting himself with the terms of the lease as he ought reasonably to have done—*Molyneaux v. Hawtrey*, [1903] 2 K.B. 487; *In re Hardwicke and Lipskin's Contract*, [1902] 2 Ch. 666.

Where the vendee is *perfectly aware* of the defect in title or existence of an incumbrance, there is no duty on the part of the seller to inform the buyer of such defect or incumbrance. Therefore, where the vendee buys with full knowledge that the vendor has not got a good title, he

cannot be said to have been defrauded by the vendor within the meaning of the last clause of this section—*Ramasubbu v. Muthiah*, A.I.R. 1925 Mad. 968 (969), 85 I.C. 999. Similarly, if the defect in title is such that the purchaser could have discovered it if he had taken reasonable care to investigate the title, there is no duty cast on the vendor to disclose the defect; and the purchaser is not entitled to say that there has been a fraud on the part of the vendor in not informing him of the defect—*Harilal v. Mulchand*, 52 Bom. 883, 30 Bom.L.R. 1149, 113 I.C. 27, A.I.R. 1928 Bom. 427 (429).

299. Remedy of purchaser:—The law is now well settled that where the purchaser discovers defects in the property before conveyance, he can rescind the contract or successfully oppose a suit for specific performance (*Reeve v. Berridge*, 20 Q.B.D. 523), but if the purchaser discovers material defects after the conveyance, he must make out a case of fraud in order to set aside a sale (*Brownlie v. Campbell*, 5 App. Cas. 937)—*Eastern Mortgage and Agency Co. Ltd. v. Fazlul Karim*, 52 Cal. 914, A.I.R. 1926 Cal. 385 (389), 90 I.C. 851.

Under the concluding words of this section, an omission to make the disclosure under clause (1) (a) is fraudulent. *Prima facie*, therefore, such an omission may also be a “fraud” as defined by sec. 17 (5) of the Indian Contract Act, and so render the contract voidable at the option of the purchaser under sec. 19, or else a purchaser may sue for rescission under sec. 35 of the Specific Relief Act—*Bai Dosibai v. Bai Dhanbai*, 49 Bom. 325, A.I.R. 1925 Bom. 85 (87), 85 I.C. 597.

300. Misdescription:—If the misdescription is not of sufficient importance, and does not go to the essence of the contract, the sale will not be annulled but compensation will be given to the purchaser. “In each case the question depends upon the view of the Court as to the importance of the misdescription”—*Fawcett v. Holmes*, (1889) L.R. 42 Ch. D. 150. Thus, a parcel of property was sold ‘with a cook-room attached to it’, but no such cook-room was in fact attached to the property; the purchaser applied for rescission of the sale. *Held* that the absence of the cook-room was not very material because there was enough space on which a cook-room could be built; it did not go to the very essence of the contract so as to warrant the Court in saying that the sale ought to be annulled; an adequate compensation was a sufficient remedy—*Administrator-General v. Aghore Nath*, 29 Cal. 420 (426). Where the sale-deed recited that some of the lands sold had been given for cultivation to tenants for one year, but on completion of the sale it was found that the tenants were permanent tenants of the land, *held* that there was an error or misdescription as to the quality of the interest transferred, for which the purchaser was entitled to claim damages without rescinding the sale—*Viswanath v. Bala*, 18 Bom.L.R. 292, 34 I.C. 147 (148). But where the misdescription goes to the essence of the contract and materially alters the substance of it, *i.e.*, where the misdescription, although not proceeding from fraud, is so material that it may reasonably be supposed that but for such misdescription the purchaser would have never entered into the contract at all, in such a case the contract will be avoided altogether, and the purchaser is not bound to resort to the remedy of compensation—*Flight v. Booth*, 1 Bing. N. C. 440, 41 R.R. 599; *In re Puckett and Smith's Contract*, [1902] 2 Ch. 258. Where the vendor did not guarantee the area of the property as stated in the sale-deed, nor did he make

any representation in respect thereof as would amount to an assurance, but designedly or undesignedly left the vendee under an impression that the deficiency in area, if any, would not be great, and the vendee remained content with it and did not take steps to have a measurement made, *held* that the vendee was not entitled to any damages or to a conveyance of more land in case the actual area of the plots sold was found to be less than that given in the sale-deed—*Hassonally v. Tribhowan Das*, 25 C.W.N. 385 (397) (P.C.), 61 I.C. 361, A.I.R. 1921 P.C. 40.

A misdescription should be distinguished from mere laudatory expressions and puffing advertisements, such as where a house of mean character is described as a "desirable residence for a family of distinction", or a land imperfectly watered is described as "uncommonly rich water-meadow land"; such expressions, though objectionable from the point of view of honesty, will not render the contract voidable by the purchaser, because their exaggerative character is obvious from the very nature of the language used. See Dart's *Vendors and Purchasers*, p. 110. If the purchaser is aware that the vendor's laudatory statements are false, and yet enters into a contract, the rule of *caveat emptor* will apply, as for instance in a case where a coal-mine was stated to be "standing on a fine vein of coal" but the purchaser knew that it had been worked and was almost exhausted—*Colby v. Gadsden*, 34 Bing. 416.

301. Cl. (1) (b)—Vendor is bound to produce documents of title:—Clause (1) (b) imposes upon the vendor the duty of producing his title-deeds for inspection by the purchaser at his request. "As to incumbrances and defects in title, a vendor must produce to the purchaser all such documents of title, in his possession or power, as are necessary, and must inform him of all material defects not apparent thereon."—Dart's *Vendors and Purchasers*, p. 105 (cited in 20 Bom. 522, 530). "A prudent purchaser will enquire for the title-deeds, and demand a satisfactory explanation if any of them are not forthcoming. His omission to make such an inquiry may fix him with notice of an equitable mortgage by deposit"—Dart, p. 520; *Whitbread v. Jordan*, 1 Y. & C. 303. Thus, where in reply to inquiries by a purchaser the vendor said that the title was unincumbered and the title-deeds were at his bankers for safe custody, and the question was allowed to drop, the purchaser was held to have constructive notice of an equitable mortgage secured by deposit of the title-deeds—*Maxfield v. Burton*, L.R. 17 Eq. 15.

Under this clause, the vendor is bound to produce his documents of title for examination by the buyer only when the latter asks for them. Note the words '*at his request*'. Where the purchaser never asked for the title-deeds, the fact that the vendor did not produce them would not justify the purchaser in repudiating the contract—*Maung Po Te v. Maung Shwe*, 10 Bur.L.T. 35, 35 I.C. 373 (374).

The words "*possession and power*" indicate that the vendor is bound to produce not only the deeds in his possession, but also those which he can procure, and the mere fact that the procuring of those documents will cause the vendor trouble and expense is no answer to the purchaser's demand. But his liability is confined to the production only of those documents which affirmatively evidence the vendor's title, and does not extend to those which are merely required to negative some possibilities. See Dart, p. 627.

If the vendor fails to produce documents to show at least a marketable title, the purchaser is entitled to refuse to complete the sale, and the vendor is bound to return to the purchaser his deposit with interest at the usual rate—*Shrinibasa v. Meherbai*, 41 Bom. 300 (311) (P.C.).

While the vendor is liable to *produce* his title-deeds for inspection by the purchaser or any one on his behalf, he is not bound to *deliver* them to him before the completion of the sale—Sugden's *Vendors and Purchasers*, p. 29. These must be delivered after payment of purchase-money; see clause (3) of this section.

In India, the seller is not bound to *deliver an abstract* of title; his only obligation is to produce his documents of title for examination by the buyer, if the latter so requests—*Jyoti Prosad v. H. V. Low & Co.*, 34 C.W.N. 347 (351); A.I.R. 1930 Cal. 561.

Clause (1) (b) however is not exhaustive, because it does not state *where* the deeds are to be produced, at whose *expense*, and how far is their non-production vital to the contract—Gour's *Law of Transfer*, 6th Edn., Vol. I, p. 723.

302. Cl. (1) (c):—Vendor is bound to answer material questions:—Under clause (1) (c) the vendor is bound to answer to the best of his information all relevant questions put to him by the purchaser in respect of the property; and the purchaser's omission to ask questions will not relieve the vendor of his liability to disclose material defects in the property—*Heywood v. Mallalien*, 25 Ch. D. 357; Dart, p. 167.

The questions asked by the purchaser must be *relevant*, i.e., specific and direct, and not too general or vague. Thus, where the purchaser made the following requisition:—"Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission or any incumbrance affecting the property not disclosed by the abstract?" It was held that neither the vendors nor their solicitors were bound to answer such a *general* question—*In re Ford and Hill*, 10 Ch. D. 365. Any information regarding the income or the rental of the property is a relevant question, which it is the duty of the seller to answer. If he gives an answer which is false, he is guilty of a breach of duty and misrepresentation. Further, if he volunteers any information about the income, he is certainly bound to give true information—*Prem Chand v. Ram Sahai*, 28 N.L.R. 184, A.I.R. 1932 Nag. 148, 140 I.C. 209.

303. Cl. (1) (d):—Preparation of conveyance:—Under clause (1) (d), it is the duty of the *purchaser*, and not of the *vendor*, to prepare the conveyance—*Kapadbhanj Municipality v. Ochavulal*, A.I.R. 1928 Bom. 328 (330), 30 Bom.L.R. 920, 113 I.C. 161; *Dinkar Rao v. Ayub*, A.I.R. 1923 Nag. 37 (39). Upon a sale in consideration of a gross sum, the purchaser having accepted the title is bound, subject to any special stipulation in the contract, to prepare the conveyance and tender it for execution to the vendor—Dart, p. 570. The execution of the conveyance by the vendor and the payment of the price by the purchaser being presumed in law to take place simultaneously, if the vendor beforehand signifies his refusal to execute the conveyance, the purchaser need not tender the purchase-money or a draft of the conveyance—*Essaji v. Bhimji*, 4 B.H.C.R. (O.C.) 125.

It is the duty of the purchaser to tender a conveyance to the vendor for execution, and until such tender is made by the purchaser or waived

by the vendor, the purchaser has no right to obtain the title-deeds—*Ma Huit v. Maung Po Pu*, 31 C.L.J. 87 (P.C.), 55 I.C. 791 (792), A.I.R. 1919 P.C. 124. Under this clause, it is the duty of the vendor to execute and deliver a valid conveyance to the purchaser, and if for any reason he executes an invalid or ineffective conveyance, he has no answer to a suit for specific performance of the agreement to sell and for the execution of a legal and binding sale-deed—*Santhayi v. Mahomed*, 11 L.B.R. 94, 65 I.C. 405, A.I.R. 1921 L.B. 16.

304. Cl. (1) (e)—“Take care of the property”:—The next duty of the vendor is to take care of the property between the date of contract and the delivery of the property, as an owner of ordinary prudence would take care of it. “The vendor is *pro-tanto* a trustee in possession although he holds the purchaser at arm’s length, and, as a trustee, is bound to do those things which he would be bound to do if he were a trustee for any other person”—*per* Lord Selborne in *Phillips v. Silvester*, L.R. 8 Ch. 173 (177). Cf. section 15 of the Indian Trusts Act (II of 1882). The obligations begin to arise as soon as the purchaser has paid the purchase-money, though he has got no conveyance; and even when instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow as a necessary corollary that to the extent to which he has paid the money, the vendor is a trustee for him—*per* Lord Cranworth in *Rose v. Watson*, 10 H.L.C. 672 (683). And since he is a trustee, he would be liable for damages as if on a breach of trust, if he is guilty of waste or other misfeasance—*Clarke v. Ramuz*, (1891) 2 Q.B. 456. The position of the vendor in this respect has also been held to be analogous to that of a mortgagee in possession—*Phillips v. Silvester*, L.R. 8 Ch. 173.

305. Cl. (1) (f)—Delivery of possession:—In every contract of sale, unless the contrary appears, the vendor must be deemed to impliedly agree to give possession of the property to the purchaser, in addition to executing a conveyance in his favour—*Surendra Ramanujan v. Sivalingam*, 47 Mad. 150, 45 M.L.J. 431, A.I.R. 1924 Mad. 360, 77 I.C. 542. Under clause (1) (f), the obligation is upon the *vendor* to give the vendee possession, and not upon the latter to get possession for himself, especially when any difficulty arises in identifying the particular land sold. It is the duty of the vendor to ascertain the subject matter of sale—*Darpan Koer v. Kedar Nath*, 1 P.L.J. 140, 35 I.C. 539.

In the absence of a contract to the contrary, the vendor is liable to give up possession *immediately* after the execution of the sale-deed—*Sri Ram v. Kidari*, 6 Lah. 308, 88 I.C. 743, 26 P.L.R. 488, A.I.R. 1925 Lah. 481. But the vendor is not bound to put the purchaser in possession before the conveyance is executed—*Kapadvanj Municipality v. Ochhavlal*, 30 Bom.L.R. 920, A.I.R. 1928 Bom. 328 (330), 113 I.C. 161; nor can the purchaser insist on getting possession before the terms of the conveyance have been agreed upon and before actual execution of the conveyance—*Ibid.*

The vendor is bound to give such possession of the property as its nature admits, *i.e.*, such possession as is capable of being taken. The word “possession” is a flexible one, and when the property is stated to be in the occupation of tenants subject to whose tenancy the purchaser buys, the nature of the contract shows that possession means possession as landlord—*Sugden’s Vendors and Purchasers*, p. 8. If the property is already mortgaged with possession to a usufructuary mortgagee, the purchaser will

get such possession as the vendor had, *viz.*, proprietary possession—*Mumtazunnessa v. Bhagirath*, 6 I.C. 114.

Where the property sold is the coparcenary interest of a Hindu member of a joint family, specific possession cannot be given unless the other members of the family are parties to the suit—*Abdul Aziz v. Ajudhia*, 15 C.P.L.R. 156; *Rewa Singh v. Hardayal*, 3 N.L.R. 160. See also sec. 44.

See also Note 292 in sec. 54 under heading "Delivery of possession."

Where the parties agree that possession in a particular way should be given, the agreement will be enforced; and possession given in any other way will not satisfy the requirements of law. Thus, if the purchaser of a house wants actual possession thereof, a constructive possession will not avail, and the purchaser is entitled to repudiate the contract—*Phillips v. Caldcleugh*, L.R. 4 Q.B. 159.

The non-payment of purchase-money does not prevent the ownership from passing from the vendor to the purchaser, and the latter, notwithstanding such non-payment, can maintain a suit for possession. For cases see Note 281 in sec. 54, under heading "Non-payment of price." If the vendor fails to give possession, the purchaser is entitled to rescind the contract and to recover the purchase-money if already paid. But if in the conveyance the vendor expressly stipulates that he would not be liable to the purchaser if the latter fails to get possession by reason of the act of anybody other than the vendor, *held* that the purchaser, on his failure to get possession of the land, owing to the act of a third party, would not be entitled to a refund of the purchase-money—*Indra Narain v. Badan Chandra*, 47 I.C. 340 (Cal.).

306. Cl. (1) (g)—Payment of public charges, rents:—An agricultural loan by the Government is not a public charge any more than it is a public debt. But it may be an incumbrance by statute or contract, and then it is the duty of the vendor to discharge it—*Dantuluri v. Kunjuluri*, 9 M.L.T. 108, 8 I.C. 435. A tax levied by the Municipality under the Local Acts must be paid according to the terms of those Acts. Thus, a house tax levied under the Madras District Municipalities Act is a yearly tax, though payable in two half-yearly instalments, and the whole year's tax will be levied from the purchaser, though the second half-yearly instalment only became due after he purchased the house—*Chairman Municipal Council v. Kottamma*, 30 Mad. 423.

Where leasehold property is sold, the vendor is bound to pay the rent which had accrued due, up to the date of sale, not only during the tenancy of the vendor but also during the tenancy of a person through whom he claimed otherwise than by purchase—*Phul Kuer v. Rambhanjan*, A.I.R. 1924 Pat. 822, 75 I.C. 975.

307. Discharge of incumbrances:—One of the duties of the vendor is to discharge amongst other things all incumbrances on the property existing at the date of the sale, except where the property is sold subject to incumbrances—*Munirunnissa v. Akbar Khan*, 30 All. 172. The owners of certain immoveable property, which was under a mortgage, entered into a contract for the sale of the property but subsequently declined to complete the sale on the ground that the property had already been mortgaged and that the mortgagees refused to release the property. On a suit by the vendee for breach of the contract of sale, *held* that the vendors were bound to convey the property free from the incumbrances, and the existence

of the mortgage was no defence to the purchaser's action—*Nabin Chandra v. Krishnabarana*, 38 Cal. 458.

Clause (1) (g) clearly means what it says, *viz.*, that there must be a provision in the sale-deed that the property is sold subject to incumbrances, and if that provision is not specifically set out in the sale-deed, then the vendor will be liable for all prior incumbrances. This clause cannot be interpreted to mean that the vendor is only liable if he stated in the sale-deed that he sold the property free from incumbrances—*Jugal Kishore v. Banwari*, 51 All. 1053, 119 I.C. 1, A.I.R. 1929 All. 791.

Even in those provinces (*e.g.* Berar) to which the T. P. Act does not apply, a covenant for quiet enjoyment and freedom from incumbrances should, independently of this Act, be held to be implied in a sale, in accordance with justice, equity and good conscience. Consequently the vendor is bound to reimburse the purchaser for the payment made by the latter to discharge the incumbrances created by the vendor and not disclosed in the conveyance—*Keshrimal v. Kadhai*, 55 I.C. 152 (153) (Nag.).

If the vendor does not discharge the incumbrances, the vendee is entitled under clause (5) (b) to retain out of the purchase-money the amount of the incumbrances, and to pay the amount so retained to the persons entitled thereto.

If the vendor professes to sell unencumbered property, but the property is found to be mortgaged, the vendee may, before completing the contract of sale, compel the vendor to redeem the mortgage and to obtain a re-conveyance from the mortgagee. See sec. 18 (c) Specific Relief Act. If the incumbrance is discovered after payment of the purchase-money, the vendee can redeem the mortgage by paying the mortgage money himself and can file a suit against the vendor for recovery of the money (sec. 69, Contract Act)—*Manishankar v. Rama Krishna*, 6 Bom. L.R. 832; *Bhagwati v. Banarsi*, 50 All. 371 (P.C.), 32 C.W.N. 705 (708), A.I.R. 1928 P.C. 98, 108 I.C. 687; *Nathu Khan v. Burtonath Singh*, 20 A.L.J. 301 (P.C.), 26 C.W.N. 514, 42 M.L.J. 444, 66 I.C. 107, A.I.R. 1922 P.C. 176 (178).

The provision under clause (g) is one which cannot be enforced against the vendor, *after* the completion of the sale, without an express covenant to that effect. Thus, if at the time of purchase the amount due under the mortgage was Rs. 16,000, as disclosed in the preliminary decree on the mortgage, but after the sale was complete the decree was amended and the mortgagee was held to be entitled to a sum of Rs. 23,000, which the purchaser had to pay in order to release the mortgage, and he thereupon sued the vendor for the difference between the sum which he paid to the mortgagee and the sum of Rs. 16,000, *held* that the purchaser's claim could not be allowed. The amount that was stated in the sale-deed was the actual amount then found due under the mortgage-decree, but on a proper construction of the sale-deed, the purchaser was bound to discharge the incumbrance *entirely* and not merely to pay the sum mentioned in the sale-deed. The decree was amended by an order *subsequent* to the purchase. If, by the amendment the amount had been reduced, the purchaser would have profited by it. On the same principle, he was bound to pay the entire amount as increased by the amended decree—*Bidhu Bhusan v. Umesh*, 57 Cal. 683, 51 C.L.J. 538, A.I.R. 1930 Cal. 568 (571), 128 I.C. 183.

If the property had been mortgaged to a partnership firm, the vendee is entitled to require further proof of the release of the property than

merely a document purporting to be signed by one of the partners for the firm as a whole. He is entitled to proof as to who all the individual partners are and as to whether they have authorised that partner to reconvey the property—*Hirachand v. Jayagopal*, 49 Bom. 245, A.I.R. 1925 Bom. 69, 89 I.C. 553.

308. Clause (2)—Covenant for title:—A covenant to indemnify is not the same thing as a covenant for title, and does not run with the land; consequently, if A sells a property to B, and C executes an indemnity bond to indemnify B if he is dispossessed of the property, the benefit of the covenant of indemnity cannot be taken advantage of by a person who purchases the property from B (or who purchases the property at Court sale)—*Natesa v. Gopalasami*, 51 Mad. 688, A.I.R. 1928 Mad. 894 (896).

It is doubtful even whether a covenant for title mentioned in this clause can pass to a purchaser at Court sale—*Ibid*.

The benefit of the covenant for title can be enforced by a pre-emptor who steps into the shoes of the vendee. He assumes all the liabilities and becomes entitled to all the benefit to which the vendee is entitled—*Md. Siddiq v. Md. Nuh*, 52 All. 604, A.I.R. 1930 All. 771 (774), 124 I.C. 185.

The covenant implied in this clause runs with the land, and a purchaser from the vendee or a purchaser from a pre-emptor is entitled to the benefit of this covenant—*Bapu v. Kashiram*, 31 Bom.L.R. 658, 119 I.C. 659, A.I.R. 1929 Bom. 361 (363); *Hanwant v. Chandi*, 51 All. 651, 1929 A.L.J. 433, A.I.R. 1929 All. 293 (295), 119 I.C. 243. See the third para of clause (2). This para lays down that the benefit of the covenant of title may be enforced by any person in whom the property is in whole or in part from time to time vested. So, where the purchasers have sold the property purchased by them to another person, they are no longer entitled to get a decree for damages against the vendor for his failing to convey proper title, because the property is no longer vested in them but in their vendee, and it is their vendee and not they themselves who have sustained damages for defect in the vendor's title—*Ramayya v. Kotayya*, 32 L.W. 138, 1930 M.W.N. 195, A.I.R. 1930 Mad. 748 (751), 127 I.C. 617.

This clause applies not only to cases where there has been a complete sale, but also applies to cases where the transaction has not progressed beyond the stage of contract—*per* Abdur Rahim J. in *Adikesavan v. Gurnatha*, 40 Mad. 338 (350) (Sadasiva Ayyar J. contra); *Imjad Ali v. Mohini*, 27 C.W.N. 1025, A.I.R. 1924 Cal. 148, 80 I.C. 623; *Kathamuthu v. Subramanian*, 50 M.L.J. 228, 94 I.C. 561, A.I.R. 1926 Mad. 569. In some other cases the Madras High Court also lays down that a covenant of title is not only attached to a contract of sale but is also attached to the conveyance—*Arunachala v. Ramasami*, 38 Mad. 1171 (1175); *Sigamani v. Munibadra*, 49 M.L.J. 668, A.I.R. 1926 Mad. 255, 91 I.C. 514.

The presumption as to the title of the vendor is absolute, and, in the absence of a contract to the contrary, is irrebuttable—*Md. Siddiq v. Md. Nuh*, 52 All. 604, 1930 A.L.J. 653, A.I.R. 1930 All. 771 (773), 124 I.C. 185. An *express* covenant of title in a sale-deed is not necessary, since under this clause such a covenant is *implied* in every sale of immoveable property—*Ramayya v. Kotayya*, 32 L.W. 138, A.I.R. 1930 Mad. 748 (750), 127 I.C. 617. The expression “shall be deemed to contract” in this clause implies that the covenant mentioned in this clause must be deemed to be embodied in every contract of sale, and that the rule of *caveat emptor* is

thus rendered obsolete—*Basaraddi v. Enajaddi*, 25 Cal. 298 (300); *Ramchandra v. Dwarkanath*, 16 Cal. 330; *Chidambaram v. Shivattaswamy*, 15 M.L.J. 396; *Mehdi Husain v. Jafar Khan*, 8 O.C. 345.

A covenant for title is implied in a sale of immoveable property, and the onus is on the vendor to prove a contract displacing that presumption—*Sri Ram v. Kidari*, 6 Lah. 308, 88 I.C. 743, A.I.R. 1925 Lah. 481.

A covenant of title does not include a covenant to give possession. In the absence of an express covenant there is nothing in clause (2) to imply that the vendor shall put the vendee in possession of the property—*Muthusami v. Dharma Raja*, 1926 M. W.N. 209, A.I.R. 1926 Mad. 495, 94 I.C. 302. So also, a guarantee of title does not include a guarantee of payment of arrears of rent which passed with the land. The remedy of the purchaser, if the tenants fail to pay the arrears of rent, is a suit against the tenants and not against the seller—*A. L. Chettiar v. Maung Thet*, 6 Bur. L.J. 24, A.I.R. 1927 Rang. 134 (135), 101 I.C. 320.

Under this clause, the seller merely gives a warranty that he has in fact and in law the estate which he professes to have—a warranty which would take effect upon proof of breach; but he does not undertake (as in England) to *show* a good title by production of documents and verification of facts—*Jyoti Prosad v. H. V. Low & Co.*, 34 C.W.N. 347 (351), A.I.R. 1930 Cal. 561.

A covenant of title will be implied to be imported into a contract if the transaction is one of *sale* as defined in sec. 54. A mere license granted to a person to cut and remove trees is not a sale, and no covenant for title or quiet enjoyment will be deemed to be attached to such a transaction—*Mammikuti v. Puzhakkal*, 29 Mad. 353.

Purchaser's remedy:—If the purchaser fails to obtain possession, owing to the vendor's defect of title, another person having a better title being in possession of the property, the purchaser is entitled to a refund of the purchase-money—*Ragava v. Samachariar*, 1 L.W. 8, 1914 M.W.N. 57, 22 I.C. 42. If, however, the purchaser obtains possession but is subsequently dispossessed owing to the vendor's defect of title, the remedy of the purchaser is not a refund of the original consideration but damages measured according to the market value of the land at the time of dispossession. The measure of damages should be the extent of the loss suffered by him, *i.e.*, the loss of the property. In order to compensate him fully and to put him in a position as if he had suffered no loss whatever, one would have to deliver him another property of the same value as that which he has lost. It therefore follows that the measure of damages is the market value of the property at the time when it goes out of his possession. It would be unjust and inequitable to base the amount of damages on the original consideration paid at the time of purchase, because since that time the situation might have considerably changed—*Md. Siddiq v. Md. Nuh*, 52 All. 604, 28 A.L.J. 653, A.I.R. 1930 All. 771 (777), 124 I.C. 185.

When vendor is relieved of his liability:—Under this clause, there is an implied liability on the vendor to give to the purchaser a title free from reasonable doubt. But this liability may be relieved if there be a *contract to the contrary*. See the opening words of this section. Thus, a stipulation that the purchaser shall not investigate into the vendor's title but shall accept the title as it is, will relieve the latter of his obligation of giving a covenant for title—*Ghousiah v. Rustomjah*, 13 Mad. 158 (161, 163). But this waiver on the part of the vendee must be intentional and based upon

a full knowledge of the circumstances. If the purchaser enters into possession or pays the whole or part of the purchase-money or does other acts which a purchaser is not bound to do till a good title has been made out, he may be deemed to have waived his objections as to title. The question as to whether objection as to title has been waived is one of fact, and it may be that under certain circumstances the payment of purchase-money may indicate a waiver on his part. But where the purchase-money has been paid under an honest error of judgment on the part of the vendee's solicitors as to the title, such payment does not amount to waiver and the vendee is entitled to a refund of the purchase-money if the vendor fails to make out a marketable title—*Meghji v. Tayeballi*, 26 Bom.L.R. 1019, A.I.R. 1925 Bom. 64, 90 I.C. 189. A covenant contained in a sale-deed to the effect that "if any dispute arises through me (vendor) in respect of the land, I shall get it settled" does not amount to a 'contract to the contrary'. This covenant means that the vendor will see that if the purchaser does not get full ownership, title and peaceful possession through the defect in the vendor's title or through the act of the vendor, the latter is bound to remove such defect. It does not exclude the covenant of title required by sec. 55 (2)—*Ragava v. Samachariar*, 1 L.W. 8, 1914 M.W.N. 57, 22 I.C. 42.

The "contract to the contrary" must be a written one, and cannot take the shape of an *oral* agreement, because it would not be admissible in evidence under sec. 92 Evidence Act in contradiction of the written deed of sale—*Md. Siddiq v. Md. Nuh*, 52 All. 604, 1930 A.L.J. 653, A.I.R. 1930 All. 771 (774), 125 I.C. 185; *Adikesavan v. Gurunatha*, 40 Mad. 338 (351) (F.B.).

The effect of a covenant for title implied in this clause can be got rid of by the vendor indicating by *clear and unambiguous* expressions that he does not mean to guarantee that he has got title to the property and is entitled to convey the same—*Mahomed Ali v. Budharaju*, 39 M.L.J. 449, 60 I.C. 235 (236). But the vendor cannot get rid of his liability under this clause by reason of the fact that the purchaser had *knowledge* of the defect of his title. Under this clause there is a statutory guarantee for good title unless the same is excluded by the contract of parties, and the question of knowledge of the purchaser does not affect his right to be indemnified under the Indian statute law—*Subbaroya v. Rajagopala*, 38 Mad. 887 (889); *Arunachala v. Ramasami*, 38 Mad. 1171 (1175), 25 I.C. 618, 27 M.L.J. 517; *Thekkemannengath Raman v. Pazhiyot Manakkal*, 28 M.L.J. 184, 27 I.C. 989; *Basaraddi v. Enajaddi*, 25 Cal. 298 (301); *Bapu v. Kashiram*, 31 Bom.L.R. 658, 119 I.C. 659, A.I.R. 1929 Bom. 361 (364); *Lakhpal v. Durga Prasad*, 8 Pat. 432, 117 I.C. 654, A.I.R. 1929 Pat. 388 (389); *Adikesavan v. Guru Natha*, 40 Mad. 338 (351) (F.B.); *Mahomed Ali v. Budharaju Venkatapathi*, 39 M.L.J. 449, 60 I.C. 235 (237); *Nawal Kishore v. Sarju*, 54 All. 774, 139 I.C. 99, A.I.R. 1932 All. 546 (547); *Ramchandra v. Dwarkanath*, 16 Cal. 330; *Lachman Das v. Jawahir Singh*, 44 P.L.R. 1922, A.I.R. 1924 Lah. 476, 70 I.C. 250. Where the purchaser knew that there were disputes about the title, but he was assured that he would be given documents to prove that the property was the vendor's by ancestral right, *held* that the vendee had a claim for damages against the vendor—*Parasurama v. Muthuswamy*, 50 M.L.J. 100, A.I.R. 1925 Mad. 1209, 91 I.C. 313. Where the vendor sold under the condition that "the purchaser shall take such title as the vendor possesses, and the vendor shall not be bound to give any better title to the purchaser

than he possesses," and the purchaser *believed that the vendor had some title*, however defective, but it was afterwards found that the vendor had *no title*, nor even possession, *held* that the purchaser could not be compelled to take the property—*Motivahoo v. Vinayak*, 12 Bom. 1 (17). Unless the purchaser *took the conveyance with all defects* in the vendor's title, the mere fact that he knew or was expected to know all about the property conveyed to him would not disentitle him to repudiate the contract and get a refund of the purchase-money—*Basaraddi v. Enajaddi*, 25 Cal. 298 (301).

The vendor is also relieved of his liability, if the property which he proposes to sell is by its very nature *inalienable* (e.g., a *Karamkuri* tenure or occupancy holding) and the *purchaser is aware of it*. In such a case no covenant for title can be given by the vendor, and if the purchaser is ejected by the superior landlord, the vendor will not be liable for damages on any implied covenant for title—*Sankaran Nair v. Ramaswami*, 2 L.W. 155, 27 I.C. 889 (890); see also *Kulla Mal v. Umra*, 61 I.C. 604 (Lah.).

Covenant of indemnity:—Where a vendor agreed to indemnify the vendee for the costs in suits in which the latter would be obliged to defend his title to the property conveyed, and where a suit was filed and the vendee incurred costs therefor in defending his title to the property: *held* that the vendee was entitled to recover the costs—*Venkata Rangayya v. Satyanarayana*, 39 M.L.J. 316, 60 I.C. 164 (165).

A general indemnifying clause in a sale-deed making the vendor liable for any loss which might accrue in connection with the sale can properly be held to include the risk of the vendee's title being defeated by a pre-emptor—*Kalian Singh v. Fazal Din*, 94 I.C. 1055, A.I.R. 1926 Lah. 455; *Khonmon Bibi v. Shah Mali*, 111 P.R. 1908, 4 I.C. 690.

Covenant of title in sale by trustees:—See proviso to clause (2). In the case of a sale by a trustee it is also provided in sec. 38 of the Indian Trusts Act (II of 1882), that the trustee selling the trust property may insert such stipulations either as to title or evidence of title or otherwise in any contract for sale, as he thinks fit.

309. Clause (3)—Delivery of documents of title:—The title-deeds of an estate, counterpart leases and other documents of the like kind such as *kabuliyats* ought to be regarded as accessory to the estate and pass with it. Although village account-books cannot properly be called title-deeds, these may be claimed by the purchaser as necessary for the enjoyment of the property and accessory to it—*Shri Bhavani v. Devrao*, 11 Bom. 485. The vendor is bound to deliver the documents of title *relating to the property*; he is not bound to hand over a mortgage-deed or will which had been executed by a previous owner of the property and which are not at all relevant to the present title of the vendor. See *Haji Mahomed v. Musaji*, 15 Bom. 657 (666).

As soon as the purchaser has paid the purchase-money, the vendor is bound to deliver up the title-deeds. If the vendor has delivered them up to the purchaser beforehand, as for the purpose of drawing up the conveyance, the latter will, on completion of the conveyance and payment of the purchase-money, be entitled to retain possession of them; but if he refuses to perform the contract and to return the deeds to the vendor, a suit will certainly lie for their recovery—*Parry v. Frame*, 2 Bo. & Pul. 451. If the purchaser after payment of the purchase-money,

negligently but without fraud, leaves the title-deeds in the hands of the vendor, any subsequent purchaser from the first purchaser may recover them from the original vendor, and even against a person to whom the vendor has fraudulently conveyed the property—*Harrington v. Price*, 3 B. & Ad. 170.

The vendor is to deliver up not only the title-deeds which are in his *possession* but also those which are in his *power*; and the mere fact that the procuring of those documents will cause him trouble and expense is no answer to the purchaser's demand. For it is the vendor who must bear the expense of obtaining the title-deeds required by the purchaser to be handed over to him on completion of sale, although such deeds are not in the vendor's possession and are not referred to in the abstract—*In re Dutty and Jesson's Contract*, (1898) 1 Ch. 419.

Where there are several purchasers, the purchaser of the lot of the *greatest value* (and not the largest area) is entitled to the custody of the deeds. See clause (3) (b). See also Sugden's *Vendors and Purchasers*, p. 434. But if there be a condition that the purchaser of the largest lot shall have the title-deeds, such condition will be given effect to, and the purchaser of the lot largest in superficial area shall get them—*Griffiths v. Hatchard*, 1 K. & J. 17.

310. Clause (4)—Seller's right to rent before completion of sale:—The seller is entitled to all rents and profits of the land between the date of the contract of sale and the date of its completion. The vendee is not entitled to possession or mesne profits as such before the date of the execution of the registered conveyance in his favour. He will, however, be entitled to compensation for breach of the contract to convey in addition to the execution of the conveyance, and such compensation will naturally be the value of the mesne profits which could have been obtained between the date when the breach of contract took place and the date when the conveyance was actually executed—*Subbaroyar v. Kottaya*, 1916 M.W.N. 284, 34 I.C. 737. But although the vendor is entitled to rents and profits till the completion of the sale, he cannot commit waste by taking crops in an immature state or otherwise than by due course of husbandry—Dart's *Vendors and Purchasers*, p. 733.

After the completion of the sale, the purchaser is entitled to the rents and profits; and if the vendor remains in possession after the sale, the purchaser is entitled to take an occupation rent from the vendor—*Metropolitan Railway Co. v. Defries*, 2 Q.B.D. 387. But no occupation rent will be allowed where the vendor has continued to be in possession only by reason of the purchaser's failure to take possession—*Dakin v. Cope*, 2 Russ. 170.

311. Vendor's charge for unpaid purchase-money:—It has already been stated under sec. 54, that non-payment of price does not prevent the ownership of the property from passing to the purchaser, and he can maintain a suit for possession of the property notwithstanding such non-payment. See Note 281 under sec. 54. But the vendor has got a charge for the unpaid purchase money under this clause—*Velayutha v. Govindaswami*, 30 Mad. 524; on appeal, 34 Mad. 543 (544). If the vendor has already delivered possession of the property to the purchaser before the payment of the price, he is not entitled to rescind the contract and to recover possession from the purchaser, or to resell the property to a third party. His remedy is to sue for the money and he has a charge on the property

for that amount, under this clause—*Trimalrao v. Municipal Commissioner*, 3 Bom. 172; *Moidin v. Avaran*, 11 Mad. 263 (264).

The charge which the vendor obtains under this Act is different in its origin and nature from the vendor's lien given by the Courts of Equity in England; and the English cases as to a vendor's lien for unpaid purchase money, though useful for the purposes of illustration, are not authoritative in the interpretation of the law on the subject as laid down in sec. 55—*Webb v. Macpherson*, 31 Cal. 57 (72) (P.C.).

Where a vendor, in compliance with the contract for the sale of an estate, executes a conveyance thereof, but the purchase money is wholly or partially unpaid, then notwithstanding that on the face of the conveyance it is expressed to be paid, or that a receipt for it is endorsed thereon, the vendor has a lien on the estate for the money due to him—*Alliance Bank of Simla v. Walsh*, 66 P.R. 1883; *Meghraj v. Abdulla*, 12 A.L.J. 1034, 25 I.C. 208; *Umedmal v. Davu*, 2 Bom. 547; *Mukta Pershad v. Abdul Razak*, 33 I.C. 527 (Oudh); *Trimalrao v. Municipal Commissioner*, 3 Bom. 172.

The vendor's charge is *non-possessory* and does not confer on him the right to retain possession by virtue of his charge. He is only entitled to retain the title-deeds and to charge interest on the unpaid purchase-money—*Velayutha v. Govindaswami*, 30 Mad. 524. If the vendor retains possession of the property, he is liable for mesne-profits—*Hari Prasad v. Harihar*, A.I.R. 1923 Pat. 205 (206), 70 I.C. 804. If the vendor continues in possession of the property sold, and the vendee takes no steps for a long period (*e.g.*, 7 years) to take possession of the property, the vendor has a right to retain possession until the purchase-money is paid—*Subrahmaniam v. Poovan*, 27 Mad. 28 (30).

The provisions of this Act relating to charge for unpaid purchase-money do not apply to *leases*: consequently no charge can be created for the unpaid amount of premium. The only lien which is recognised in this Act is a lien in favour of the vendor—*Venkatacharyulu v. Venkatasubba Rao*, 48 Mad. 821, 90 I.C. 725, A.I.R. 1926 Mad. 55.

When lost:—The vendor's charge is not lost by a mere personal contract to defer the payment of a portion of the purchase-money or to take the purchase-money by instalments; nor is it lost by any contract, covenant or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge—*Webb v. Macpherson*, 31 Cal. 57 (72) (P.C.). The mere taking of a promissory note from the purchaser for the purchase-money does not extinguish the lien—*Karuppiah v. Hari Row*, 21 M.L.J. 849, 11 I.C. 890; *Puthi Narayanamurthi v. Marimuthu*, 26 Mad. 322; *Doraisami v. Lakshmanan*, 14 M.L.J. 285; *Vellayappa v. Narayanan*, 18 I.C. 81, 1913 M.W.N. 826; *Swaminatha v. Subbarama*, 50 Mad. 548, 51 M.L.J. 856, 100 I.C. 10, A.I.R. 1927 Mad. 219 (225).

The general rule is that the mere taking of a bond, bill, promissory note or covenant for the purchase-money will not destroy the lien. The question depends not upon the circumstance of taking a security but upon the *intention* which must be gathered from all the surrounding facts, the nature of the security and the expressions and the conduct of the vendor. If, for instance, the bond, note or covenant was *substituted* for the consideration money, the lien ceases to exist; if, on the other hand, the lien was intended to be reserved, the taking of an *additional* security would not destroy it—*Alliance Bank of Simla v. John Walsh*, 66 P.R.

1883. The acceptance by the vendor of a bond given by the vendee for payment of the balance of the purchase-money by instalments does not imply an intention on the part of the vendor to relinquish the lien—*Bashir Ahmad v. Nazir Ahmad*, 43 All. 544 (546). When there is a separate agreement for payment of part of the purchase-money in lieu of actual cash, it is a question of *intention* of the parties whether the agreement is accepted as an additional security or whether it is a substitution of the statutory charge created by sec. 55 (4) for the unpaid purchase-money—*Munayya v. Krishnayya*, 47 M.L.J. 737, A.I.R. 1925 Mad. 215 (217), 84 I.C. 949; *Krishnaswami v. Subramania*, 35 M.L.J. 305, 44 I.C. 523. Where it was intended that the vendee should execute a mortgage-deed and extinguish the lien, but the mortgage-deed was not completed by registration and remained a simple bond, the lien was not extinguished—*Ranganayaki v. Parthasarathi*, 10 L.W. 550, 54 I.C. 503. Where the vendor obtained a promissory note not from the vendee but from a third person at the instance of the vendee, and the third person did not pay, even then if the third person's note or bond was only an additional security to the vendee's liability and not in substitution of it, the lien was not lost—*Balagurumoorthi v. Nagulu*, 41 M.L.J. 267, A.I.R. 1921 Mad. 277, 69 I.C. 473. Plaintiff and another sold a land jointly to defendants 1 to 4 for Rs. 10,000; of this amount Rs. 8,650 was paid in cash, and for the balance of Rs. 1,350, the 1st defendant alone executed two promissory notes, one in favour of each of the vendors for Rs. 675 each with interest. Plaintiff sued on his promissory note for Rs. 675 and also claimed a lien for the unpaid purchase-money. *Held* that the fact that the promissory notes were executed in favour of each of the vendors by only one of the vendees, that there was a stipulation for a fixed rate of interest, and that only one of the vendors brought a suit without joining the co-vendor, showed that the promissory note formed part of the consideration, that there was therefore no unpaid purchase-money and that the plaintiff was not entitled to a charge on the land—*Krishnaswami v. Subramania*, 35 M.L.J. 304, 44 I.C. 523. An agreement by the purchaser to execute a hypothecation bond for the unpaid consideration-money does not extinguish the vendor's charge—*Lakshmana v. Sankaramoorthy*, 25 M.L.J. 245, 18 I.C. 199 (201).

Where the agreement between a vendor and a purchaser of property is that the latter should pay the purchase-money or part thereof to a *third person* to whom the vendor is indebted, there is no statutory lien on the property which the vendor can enforce in default of payment by the vendee, but only a personal covenant the breach of which must be compensated in damages—*Abdulla v. Mammali*, 33 Mad. 446; *Sivasubramania v. Gnanasammanda*, 21 M.L.J. 359, 10 I.C. 98 (102); *Gur Dayal v. Karam Singh*, 38 All. 254 (260). Thus, where a property which is subject to a mortgage is sold and part of the consideration money is left with the vendee to pay off the mortgage, the money so left is not purchase-money in the strict sense of the term, and the vendor has no lien in respect of it if it is not paid—*Mukta Pershad v. Abdul Razaq*, 33 I.C. 527 (Oudh). But, this view has not been accepted in some later cases, where it is said that a mere direction by the vendor to the vendee to pay the purchase-money or a portion thereof to the vendor's creditor does not extinguish the lien; so that on failure by the vendee to pay off the vendor's creditor, the vendor is entitled to recover the unpaid money by sale of the property

—*Daulatram v. Indrajit*, 8 Luck. 185, 141 I.C. 468, A.I.R. 1933 Oudh 33; *Sivasubramania v. Subramania*, 39 Mad. 997, 31 M.L.J. 530, 37 I.C. 459; *Kunchithapatham v. Palamalai*, 32 M.L.J. 347, 39 I.C. 405; *Meghraj v. Abdulla*, 12 A.L.J. 1034 (1038), 25 I.C. 208; *Mahadev v. Mahipal*, 12 A.L.J. 921, 25 I.C. 939; *Harchand v. Kishori*, 7 I.C. 639; *Swaminatha v. Subbarama*, 50 Mad. 548, A.I.R. 1927 Mad. 219, 51 M.L.J. 856; *Alwar Chetty v. Jagannatha*, 54 M.L.J. 109, A.I.R. 1928 Notes 56; *Ramanand v. Sheo Das*, 43 All. 314 (317), 60 I.C. 933—especially where there is nothing to show that the vendor's creditor has accepted the liability of the purchaser in lieu of that of the vendor—*Thyagaraja v. Seshappier*, 27 M.L.T. 94, 54 I.C. 458. But where the vendee at the instance of the vendor executes a promissory note for the purchase-money or part of it in favour of a third party, there is in respect of the whole or part of the purchase-money covered by such note, a "contract to the contrary" within the meaning of this section, and the vendor's statutory charge on the property is so far defeated. The position is the same, so far as the vendee is concerned, whether the third party is a *benamidar* for the vendor or not, unless it is shown that the vendee was aware that the third party was a *benamidar* for the vendor, in which case there would be no contract to the contrary—*Swaminatha v. Subbarama*, 50 Mad. 548, 51 M.L.J. 856, A.I.R. 1927 Mad. 219 (225).

311A. Enforcement of the charge:—The vendor's lien is a *personal* right so that no other person except the vendor himself (e.g., a creditor of the vendor) can enforce it—*Hari Ram v. Denaput Singh*, 9 Cal. 167. Thus, a judgment creditor of the vendor cannot, in execution of his decree, bring the property to sale as the property of his judgment-debtor. He may attach the unpaid purchase-money which is due to his judgment-debtor, but he cannot cause the property purchased by a third party to be sold for the recovery of his judgment-debt—*Moti Lal v. Bhagwan Das*, 31 All. 433. But the vendor can *transfer* the charge to an assignee. The debt itself can certainly be transferred, and there is no reason why the security for the debt should not also be transferred with it. In such a case, the transferee can enforce the charge against the purchaser—*Sheonandan v. Zainal Abdin*, 42 Cal. 849 (855), 19 C.W.N. 899.

Against whom enforceable:—This section, if read with sec. 40, shows that the vendor's lien is enforceable against the property not only in the hands of the purchaser but also in the hands of his transferees *with notice* of the non-payment of purchase-money—*Ramanand v. Sheo Das*, 43 All. 314; *Meghraj v. Abdullah*, 25 I.C. 208, 12 A.L.J. 1034; *Ram Raghubir v. United Refiners*, 9 Rang. 56, A.I.R. 1931 Rang. 139, 134 I.C. 737. This is now expressly provided by the addition of the words "any transferee without consideration or any transferee with notice of the non-payment." The *Special Committee* remarks:—"Sub-clause (b) of clause 4 of the same section provides that the vendor's lien for the purchase-money can be enforced against the property in the hands of the buyer. The provision as it stands is insufficient, as such lien can easily be defeated by the buyer by parting with the property. It is, therefore, proposed to provide that it can be enforced against the property in the hands not only of the buyer, but also of all other persons claiming under him if they have notice of the sale." The lien will be enforceable against a purchaser at a Court-sale who had full notice of all the facts—*Sheo Dulare v. Jagannath*, 7 Luck. 405, A.I.R. 1932 Oudh 88 (90), 136 I.C. 222.

But the lien cannot be enforced against the purchaser's transferees for value and without notice of the vendor's lien—*Gurdayal v. Karam Singh*, 38 All. 254 (257), 14 A.L.J. 304, 35 I.C. 289; *Syed Hassan v. Sheo Narain*, 1 Luck. 7, 3 O.W.N. 25, A.I.R. 1926 Oudh 81, 91 I.C. 917; *Tehilram v. Kashibai*, 33 Bom. 53 (68).

311B. Personal remedy:—Apart from the vendor's lien on the property for the unpaid purchase-money, the vendor has got a personal remedy against the vendee. Under sub-sec. (5) (b), the buyer is bound to pay or tender the purchase-money to the seller, at the time and place of completing the sale. This shows that the vendee is held personally liable for the purchase-money apart from the liability imposed on the property purchased—*Raghukul v. Pitam*, 52 All. 901, 1930 A.L.J. 1524, A.I.R. 1931 All. 99 (100), 130 I.C. 198.

312. Interest on unpaid purchase-money:—The vendor has a lien not only for the amount of the unpaid purchase-money, but also for the interest thereon; for it is a principle of equity that where one party to a contract of sale enters into possession of the property before the whole price has been paid, he is ordinarily liable to pay interest on the unpaid purchase-money from the date when he enters into possession—*Pandurang v. Mahadeo*, 46 Bom. 195, A.I.R. 1922 Bom. 186, 64 I.C. 492, 23 Bom.L.R. 1000; *Ratanlal v. Municipal Commissioner*, 43 Bom. 181 (200) (P.C.); *Dinkar Rao v. Ayub*, A.I.R. 1923 Nag. 37 (39). But if the delay in payment of the purchase-money is due to the vendor's own fault (e.g., default in showing a good title) he will not be entitled to take advantage of his own wrong, and the Court will deny him interest—*Ellarayan v. Nagendra Iyer*, 6 L.W. 233, 42 I.C. 509; *Narasingerji v. Raja Panaganthi*, 1921 M.W.N. 519, A.I.R. 1921 Mad. 498; *Subhadrabai v. Mahomedbhai*, 25 Bom.L.R. 931, A.I.R. 1924 Bom. 187 (189), 77 I.C. 247. But lapse of time occasioned merely by the defect of the vendor's title not known to him at the date of the contract, especially where immediate steps are taken by the vendor to remedy the defect, does not exempt the purchaser from paying interest—*Subhadrabai v. Mahomedbhai* (supra).

This clause contemplates interest being payable only if the ownership of the property has entirely passed to the buyer and the property is in the hands and therefore in the enjoyment of the buyer. Where not only is the profit claimable by the vendee proportionate to the amount of the purchase-money he has paid, but the property is also stipulated and provided to be only proportionate to the amount of the purchase-money paid by him, the case cannot be regarded as one in which the ownership of the property has absolutely passed to the purchaser in respect of the whole extent, and the purchaser is not liable for interest—*Lodd Govindoss v. Muthia Chetty*, 48 M.L.J. 721, A.I.R. 1925 Mad. 660. When the purchase-money is left with the vendee for paying a prior mortgage debt, and he has not paid it, the money is not to be treated as a security for the payment of the mortgage debt, but as a deposit, for which the purchaser should pay interest to the vendor—*Chokkalinga v. Ramanadhan*, 24 L.W. 257, A.I.R. 1926 Mad. 1031, 97 I.C. 586. But if the purchase money is left with the vendee for paying a mortgage-debt on the property and it is found that the money left with the vendee is insufficient to pay off the mortgage, the vendee is not entitled to retain the money until the vendor provides the rest of the money necessary for paying off the mortgage-debt; this retention of the money by the vendee will not be

treated as a deposit of the money of the vendor in the vendee's hands, and the vendee will not be liable to pay interest—*Muhammad Siddiq v. Muhammad Nasirulla*, 21 All. 223 (227) (P.C.).

Where the parties intended that the payment of the purchase-money and the delivery of possession of the property should be carried out contemporaneously, interest on the money would not be payable so long as the vendor was in possession of the land—*Muthu Chetty v. Sinna*, 35 Mad. 625.

The interest is payable "from the date on which possession has been delivered." These words have been added by the Amendment Act of 1929. "This clause is silent as to the date from which interest on the unpaid purchase-money should run. It seems fair that it should run from the date when the buyer is put in possession."—*Report of the Select Committee*.

313. Clause (5) (a)—Purchaser's duty to disclose facts:—Clause (5) (a) casts upon the purchaser the duty of disclosing to the seller any fact of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of the property. Under the last para of this section, the omission to make a disclosure under this clause amounts to fraud, irrespective of *intention*. And so it has been held in an English case: "If a person comes to me and offers to sell to me a property which I know to be of five times the value he offers it for, he being ignorant of his rights and in the belief that he cannot make out a title which I know that he can, and I conceal that knowledge from him, is that not a *suppressio veri*, which is one of the elements which constitute a fraud?"—*Summers v. Griffiths*, 35 Beav. p. 32. Thus, a purchase for an inadequate price from an old and infirm woman ignorant of the value of the property sold was set aside on the ground of fraud—*Sadashiv v. Dhakubai*, 5 Bom. 450.

314. Cl. (5) (b)—Payment of purchase-money:—The buyer is bound to tender the purchase-money on completion of the sale. A sale is said to be completed when the vendor executes the conveyance. The execution of the conveyance by the seller and the payment of the purchase-money by the buyer are presumed to take place simultaneously. So the purchaser need not tender the purchase-money if the vendor beforehand signifies his refusal to execute the deed—*Essaji v. Bhimji*, 4 B.H.C.R. (O.C.) 125.

The purchaser is bound to pay money in accordance with the direction of the vendor. If he directs payment to a particular person, the purchaser must make payment to such person, and in doing so, he will be entitled to retain the benefit of any remission made by such person in favour of the purchaser—*Siva Subramania v. Gnanasammanda*, 21 M.L.J. 359, 10 I.C. 98 (102).

Where the purchaser is directed by the vendor to pay off, out of the purchase-money, certain debts due by the vendor to his creditors, and the *vendee undertakes to do so*, such creditors can institute a suit against the vendee and recover the amount due to them although they had no notice of, and were not parties to, the agreement between the vendor and the vendee in respect of payment of their debts. The purchaser in such a case is treated as the trustee of the vendor's creditors for the money reserved in his hands for their benefit—*Dwarka Nath v. Priya*

Nath, 22 C.W.N. 279 (281), 36 I.C. 792, following *Gregory v. Williams*, (1817) 3 Mer. 582. If, however, the vendee *did not undertake* to pay the vendor's creditor out of the purchase-money left in his hands, the vendor's creditor was not entitled to recover the amount from the vendee—*Bhagwat Narain v. Ganga Prasad*, 62 I.C. 617 (619) (Pat.). In another case, however, the Patna High Court went still further and held that if after executing a mortgage the mortgagor sold the property leaving with the vendee money to redeem the mortgage, and the *vendee agreed* to do so, still the mortgagee could not sue the vendee on the mortgage, as there was no privity between them—*Kanta Prasad v. Nanku Prasad*, 78 I.C. 545 (Pat.). But there can be no question that where the purchaser undertook to pay the debt due to the vendor's creditor, and this undertaking was not only contained in the registered conveyance, but was also *communicated to the creditor and accepted by him*, held that the creditor was entitled to sue the purchaser on the registered instrument—*Debnarayan v. Chunilal*, 41 Cal. 137 (147), 17 C.W.N. 1143.

If the property is sold free from incumbrances, and it is found that the vendor had already mortgaged it, the vendee, if he pays off the incumbrance, is entitled to set off the amount so paid against the balance of the purchase-money remaining unpaid—*Munirunnissa v. Akbar Khan*, 30 All. 172 (175) (F.B.). If the purchase-money is insufficient to pay off the incumbrance, the purchaser is not entitled to pay at all till the vendor provides the rest of the money necessary for the purpose—*Muhammad Siddiq v. Muhammad Nasirullah*, 21 All. 223 (226) (P.C.). The principle of this clause is also applicable to the sale of a decree. Thus, where a decree sold was at the time under attachment at the instance of a creditor of the decree-holder, the purchaser of the decree can retain out of the purchase-money a sum sufficient to pay off the claim of the creditor and to remove the attachment, and if the purchaser pays off the creditor, the amount so paid will be set off against the balance of the purchase-money—*Khetsidas v. Shib Narayan*, 9 C.W.N. 178 (189, 190).

315. Cl. (5) (c):—From completion of sale purchaser must bear loss:—After the sale is complete and the ownership of the property passes to the buyer, the purchaser must suffer any loss of the property caused by destruction. If, however, the property had been insured by the vendor against loss by fire, the purchaser is entitled to the benefit of the insurance. See this subject discussed under sec. 49 *ante*.

It is implied by this clause that if any deterioration of the property takes place *before* the ownership passes to the purchaser, *i.e.*, between the contract of sale and its completion, the vendor is liable for it till the completion of the sale.

316. Cl. (5) (d):—Payment of public charges and rents:—The liability of the purchaser to pay rents and discharge burdens incidental to his ownership commences from the very date the ownership has passed to him, irrespective of the fact whether he obtained possession on that date; and this principle is applicable also to Court sales, though the section as such does not apply to them. Thus, where the purchaser at a Court sale had his sale confirmed on the 31st March but did not obtain possession till the 11th May following, he was held to be liable to pay the two instalments of rent which fell due subsequently to the confirmation of the sale, namely on 1st April and 1st May, and it was immaterial when he recovered actual possession of the land—*Ramasami v. Annadorai*, 25 Mad. 454.

317. Payment of incumbrances:—If the property is sold subject to incumbrances, the purchaser is bound to pay the money due on the incumbrances to the incumbrancer. If the incumbrances turn out to be invalid, the purchaser is entitled to the benefit of the bargain, and the vendor cannot claim it. Thus, in execution of a decree for sale, certain villages were sold and the proclamation for sale notified that there were two prior mortgages (say, for Rs. 2,000) on the property. The auction-purchaser purchased the property subject of course to the incumbrances. Subsequently it was found that the two mortgages were invalid. Then the mortgagor (judgment-debtor) brought a suit to recover from the purchaser the amount of Rs. 2,000 being the amount due on the two mortgages (the existence or supposed existence of which had led to a diminution of the price) as the vendor's unpaid purchase-money or as money which the purchaser ought in equity to return to the judgment-debtor. *Held* that after the sale was completed, the vendor had no claim to participate in any benefit which the purchaser might derive from his purchase. "If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burden attached to it. If the incumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. The vendor cannot pick up the burden of which the land is relieved and seize it as his own property"—*Izzatunnessa Begam v. Kunwar Pertab Singh*, 31 All. 583 (589) (P.C.) overruling *Inayat Singh v. Izzatunnessa*, 27 All. 97 (F.B.).

Interest:—Under this clause, the purchaser is bound to pay future interest on incumbrances accruing due after the completion of the sale, and not the accumulated interest due *before* the sale.

318. Clause (6) (a)—Purchaser's right to improvements:—After the completion of the sale, the purchaser is entitled to the benefit of any improvement in the property, in the same way as he is liable under clause (5) (c) to suffer the loss caused by destruction. As regards improvements between the date of the contract and that of the conveyance, this section does not contain any express provision; and it seems from a strict construction of the section, that the purchaser is not entitled to them; the benefit of such improvements goes to the seller. Since it is implied by clause (5) (c) that the seller is liable for deterioration of the property between the date of contract and that of completion of the sale, it is just and equitable that he should be entitled to the benefit of improvements occurring between the same period, and to claim an enhanced price. Such a claim implies of course the formation of a new contract, since there is no provision in this section for re-adjustment of price owing to increase in value of the property between the date of contract and the date of completion of the sale.

319. Clause (6) (b)—Charge for purchase-money paid in advance:—This clause is divided into two parts. Under the first part, the purchaser is entitled to certain rights which he can enforce 'unless he has improperly declined to take delivery,' which means that he is to lose those rights if the other party can show that he (the purchaser) has improperly declined to accept delivery, and the onus lies on such party. Under the latter part of the clause, the purchaser gets certain additional rights which he can claim only if he can show that "he has properly declined to take delivery,"

and the burden of showing it will be upon himself. The latter part of this clause corresponds to sec. 18 (c) of the Specific Relief Act.

The word "improperly" means owing to a default in the purchaser himself in completing the sale. And the circumstances under which he can "properly" refuse to take delivery are those under which he is justified in repudiating the contract, *e.g.*, defect of title. The question whether a purchaser by part-payment can obtain a charge on the property depends on whether the default in completing the contracts rests with him or with the vendor. It is a question of fact in each particular case as to who is in default—*Adari Sanyasi v. Nookalamma*, 54 Mad. 708, A.I.R. 1931 Mad. 592 (593), 131 I.C. 487.

A purchaser cannot be said to be acting *improperly* if he refuses to take only a fraction of the property by paying full price, in accordance with sec. 15, Specific Relief Act. That section has been enacted for the benefit of the purchaser and cannot operate to his detriment. That section gives him an option and if he declines to accept an offer which brings him loss, his conduct cannot be called improper—*Sultan Kani v. Meera Rowthen*, 56 M.L.J. 99, A.I.R. 1929 Mad. 189 (190), 115 I.C. 251.

From the moment the purchaser pays a part of the purchase-money, he has a lien on the property to that extent, and he can recover the purchase-money if the sale goes off otherwise than through a default on his part. "There can be no doubt, that when a purchaser has paid his purchase-money though he has got no conveyance, the vendor becomes a trustee for him of the legal estate. When instead of paying the whole money he pays a part of it, it would seem to follow as a necessary corollary that to the extent to which he has paid the purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien exactly in the same way as if upon the payment of a part of the purchase-money the vendor has executed a mortgage to him of the estate to that extent"—*per* Lord Cranworth in *Rose v. Watson*, 10 H.L.C. 672 (683); *Kesar v. Munna*, 13 N.L.R. 19, 39 I.C. 50 (51). Thus, if the vendor refuses to grant a proper conveyance, the purchaser is not bound to tender a draft conveyance to the vendor for execution nor to tender any purchase-money, and is entitled to recover the money already paid—*Essaji v. Bhimaji*, 4 B.H.C.R. (O.C.) 125. If the vendor received the purchase-money but executed a conveyance which he failed to register within the period of registration, whereupon it became invalid, *held* that the vendee was entitled to a charge under this clause, though he could not claim possession of the property—*Lalchand v. Lakshman*, 28 Bom. 466.

The charge mentioned in this clause is created on the property agreed to be sold from the very moment the purchase-money or a part thereof has been paid, and not after a suit for specific performance instituted in pursuance of the agreement to sell has failed—*Kesar v. Munna*, (*supra*). This lien can only be lost by reason of the purchaser's failure to carry out his part of the contract—*Balvanta v. Bira*, 23 Bom. 56 (63).

The mere circumstance that a purchaser may not be entitled to specific performance is by no means conclusive against his right to a return of his deposit. The question for determination is whether having regard to the terms of the contract and the circumstances of the case the purchaser is justified in refusing to accept such title as the vendor actually gives. If

he is justified in refusing to accept such title, he is entitled to a refund of the deposit, which the vendor has no right to retain—*Ibrahimbai v. Fletchers*, 21 Bom. 827 (853) (F.B.); *Balvanta v. Bira*, 23 Bom. 56 (61); *Karsandas v. Gopaldas*, 25 Bom.L.R. 1144, 85 I.C. 491, A.I.R. 1924 Bom. 282 (288); *Howe v. Smith*, (1884) 27 Ch. D. 89.

The purchaser loses his deposit money if the sale goes off through his default or if he unjustifiably repudiates the contract—*Balvanta v. Bira*, 23 Bom. 56 (61). Thus, where owing to the non-payment of the balance of purchase-money within the specified time by the purchaser, the vendor is entitled to rescind the contract of sale and does so, he is not bound to return the deposit money to the purchaser—*Natesa v. Appavu*, 33 Mad. 373 (374); *Bishan Chand v. Radha Kishen*, 19 All. 489 (491); *Ex parte Barrell, In re Parnell*, L.R. 10 Ch. App. 512. And if the sale falls through on account of the purchaser's own default, he cannot take advantage of a simultaneous default on the part of his vendor. Thus, if the purchaser, having accepted the title, pays the deposit but afterwards fails to pay the residue of the purchase-money and the vendor thereupon gives him notice that the contract is rescinded and the deposit forfeited, the purchaser cannot recover the deposit, if the title afterwards turns out to be bad. In other words, the purchaser, having once accepted the title, would be precluded from raising the question of title—*Soper v. Arnold*, 14 App. Cas. 429 (at p. 433).

But the fact that the balance of price was not paid on due date by the purchaser does not entitle the vendor to retain the deposit, if there are no facts found to show that the purchaser has by his delay in payment lost his right of specific performance, or if there is no conduct on the purchaser's part such as to amount to a repudiation of the contract. If in such a case the vendor denies the contract *in toto*, he cannot be allowed to retain the deposit—*Alokeshi v. Hara Chand*, 24 Cal. 897 (899). "I do not say that in all cases where this Court would refuse specific performance the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining and which would require the Court according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract or that he had entirely put an end to it, so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion, there must be acts on the part of the purchaser, which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract"—*per Cotton L.J. in Howe v. Smith*, (1884) L.R. 27 Ch. D. 89 (95).

Enforcement of charge:—Prior to the amendment of 1929, it was held that the purchaser's charge under this section could be enforced not only against the vendor but also against all persons claiming under him *with notice of the payment*, e.g., a person who after the creation of the charge obtained a title from the vendor by a consent decree and had *notice of the payment* by the purchaser—*Kesar v. Munna*, 13 N.L.R. 19, 39 I.C. 50 (52). But the words "with notice of the payment" have now been omitted for the following reasons:—

"Sub-clause (b) of clause 6 of the same section relates to the buyer's lien and provides that it can be enforced against the seller and other per-

sons claiming under him with notice of the payment. It also provides that the buyer's lien can only be enforced against a person claiming under the seller, if such person has notice of the payment of the purchase-money. The transferees and legal representatives of a seller are thus enabled to escape any liability for the amount received by the seller by pleading that they had no notice of the payment of the purchase-money. The reasons for limiting the seller's lien against third persons who have notice of the sale do not hold good in the case of the buyer's lien against persons claiming under the original seller. The words 'with notice of the payment' in sub-clause (b) of clause 6 should, therefore, be omitted."—*Report of the Special Committee.*

Agreement for sale need not be registered:—It was held by the Privy Council that, having regard to the provisions of this clause, if a vendor entered into an agreement for sale of any immovable property in writing and received earnest money as part of the consideration, the purchaser's suit for specific performance would not lie *unless the agreement itself was registered*—*Dayal Singh v. Indar Singh*, 31 C.W.N. 125 (128) (P.C.), 53 I.A. 214, 24 A.L.J. 807, 51 M.L.J. 788, 98 I.C. 508, A.I.R. 1926 P.C. 94. This ruling came as a surprise to the Bench and Bar in India, as being contrary to law and precedents, for the Indian law never required a mere contract of sale of immovable property to be registered. The Indian Legislature thereupon intervened to rectify this erroneous decision by enacting the Indian Registration Amendment Act (II of 1927), which added the following Explanation to sec. 17 of the Registration Act: "A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase-money."

Interest and costs:—The purchaser is entitled to recover not only the purchase-money paid by him but also the interest thereon—*Lord Anson v. Hodges*, 5 Sim. 227; *Kesar v. Munna*, 13 N.L.R. 19, 39 I.C. 50 (53). The rate of interest should be 9 per cent. per annum on the analogy of sec. 72—*Kesar v. Munna*, (supra). If the contract is rescinded for want of title or misrepresentation or the like, the purchaser is also entitled to the costs of the suit—*Toorance v. Bolton*, L.R. 8 Ch. 118.

This clause, which entitles the vendee to recover interest on the purchase-money he has paid, applies to those cases in which there has been an actual failure of the contract for sale through default of one or other of the two parties; but where the sale has been actually carried out and the purchaser has obtained possession (so that there has been no failure of the contract) this clause does not apply; and he cannot recover interest, owing to delay in his obtaining possession after the payment of purchase-money, where the delay was not through any default on the part of the vendor—*Kapatvanj Municipality v. Ochhavlal*, 30 Bom.L.R. 920, A.I.R. 1928 Bom. 328 (332), 113 I.C. 161.

This clause gives the purchaser a lien for the advance purchase-money and for interests and costs, but not for the *damages* awarded to him—*Sultan Kani v. Meera*, 56 M.L.J. 99, A.I.R. 1929 Mad. 189 (191), 115 I.C. 251.

56. Where two properties are subject to a common charge, and one of the properties is sold, the buyer, is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

Sale of one of two properties subject to a common charge.

56. *If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or any other person who has for consideration acquired an interest in any of the properties.*

Marshalling by subsequent purchaser.

Amendment:—This section has been redrafted by sec. 18 of the T. P. Amendment Act (XX of 1929). It closely follows the language of sec. 81. The actual amendment made in this section is the omission of the words “as against the seller,” and the substitution of the words “two or more properties” for “two properties.” The reasons are thus stated:—

“Section 56 purports to give effect to the doctrine of marshalling. In the case of a sale, the right of marshalling is given ‘as against a seller.’ It has been accordingly held by the High Courts of Madras and Allahabad that the buyer has no such right as against a prior mortgagee (31 Mad. 419; 17 All. 434). In 35 Bom. 395, 13 Bom.L.R. 678 the High Court of Bombay also took the same view and held that section 56 applied only as between a seller and his buyer and not as between a mortgagee of the seller and the buyer. Under section 55 (1) (g), in the absence of a contract to the contrary, it is the duty of the seller to discharge all encumbrances existing at the date of the sale. In practice section 56 does not give any relief to the purchaser.

“The section begins with the words ‘Where *two* properties are subject to a common charge,’ and does not provide for the case when there are more properties which are subject to a common charge and some or one of them is afterwards sold. To provide for such cases we propose to amend this section and bring it into line with section 81 which deals with the marshalling of securities.”—*Report of the Special Committee.*

Principle:—This section enunciates the rule of marshalling as applied to sales, just as section 81 deals with the rule of marshalling as applied to mortgages. The difference between the two sections is that under section 56 the purchaser is entitled to the benefit of the rule whether he had or had not *notice* of the charge, whereas under section 81 the rule applies only when the second mortgagee has not notice of the first mortgage.

The meaning of this section may be made clear by an illustration. Suppose A is the owner of two properties X and Y, both of which are mortgaged to a certain person C. B purchases the property X. He will be entitled to insist that his vendor A should satisfy his mortgage-debt out of the property Y (which is still unsold) in the first instance, as far as possible; if after the property Y is exhausted, there still remains any balance of debt unsatisfied, then and then only the property X will be drawn upon. This section does not absolutely relieve the property X, but only postpones it till the debt is satisfied out of the other property (Y) in the hands of the vendor-mortgagor.

320. Scope of section:—The words “as against the seller” in the old section showed that the section applied only as between the buyer and the seller, and not as between the buyer and the mortgagee of the seller. That is, the purchaser could not insist upon the *mortgagee* that the other property which was unsold and was still in the hands of the seller should be first sold in execution of his decree before proceeding against the property which he (the purchaser) purchased—*Subraya v. Ganpa*, 35 Bom. 395, 13 Bom.L.R. 678, 11 I.C. 989; *Krishna v. Muthu Kumarasawmiya*, 29 Mad. 217; *Appayya v. Rangayya*, 31 Mad. 419 (F.B.); *Banwari v. Muhammad*, 9 All. 690. The right of the mortgagee to bring any portion of the mortgaged property to sale was not curtailed by the fact of the mortgagor selling a portion of the mortgaged property to a third person; and it was not incumbent upon the mortgagee to proceed first against that portion of the property which had not been sold by the mortgagor—*Dilawar Singh v. Bolakiram*, 11 Cal. 258; *Bhikhari v. Dalip Singh*, 17 All. 434; *Subba Rao v. Lakshminarayana*, 22 L.W. 389, 92 I.C. 593, A.I.R. 1925 Mad. 1214; *Ram Raju v. Subbarayudu*, 5 Mad. 387. This was a great disadvantage to the purchaser, consequently the words “as against the seller” have been omitted from the present section.

The rule in this section does not apply to a case between *purchaser and purchaser*, the section being limited in its application to the case in which the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor—*Din Dayal v. Gursaran*, 42 All. 336 (341), 18 A.L.J. 287; *Magniram v. Mehdi Hosain*, 31 Cal. 95 (102); *Sitaram v. Ramrao*, A.I.R. 1931 Nag. 91 (94), 130 I.C. 817. Thus where the owner of the properties X and Y, both of which are mortgaged, sells the property X to A, and then Y to B, no question will arise as to which property will be primarily liable for the mortgage, but both properties will be liable to contribute to the mortgage-debt in proportion to their values (sec. 82)—*Din Dayal v. Gursaran*, 42 All. 336 (341); *Magniram v. Mehdi Hosain*, 31 Cal. 95 (102). “For, as between purchasers it is difficult to perceive that either has any superiority of right or equity over the other; on the contrary, there seems strong ground to contend that the original incumbrance or lien ought to be borne rateably between them according to the relative values of the estates..... Robbing Peter to pay Paul is not a principle of equity, and there is no sound reason, in the absence of special circumstances, for preferring one purchaser for value to another”—Ghose’s *Law of Mortgage*, 5th Edn., pp. 392, 393. But where a mortgaged property is sold in two portions to two purchasers, one of whom purchases without notice of the mortgage and with a covenant against incumbrances, and the other person purchases with an *express undertaking to pay off the entire mortgage*, the former

purchaser has a right to marshal as against the latter purchaser; and this latter purchaser, if he discharges the entire encumbrance, is not entitled to obtain contribution—*Kamta v. Chaturbhuj*, 8 Pat. 585, A.I.R. 1929 Pat. 664 (669, 671), 120 I.C. 17.

The benefit of this section may be claimed not only by a purchaser, but also by a mortgagee who has foreclosed and who therefore stands in the position of a purchaser; see *Tara Prasanna v. Nilmoni*, 41 Cal. 418 (422).

The rule of this section applies in the absence of a 'contract to the contrary.' Thus, one of two properties subject to a mortgage was sold. It was agreed in the sale-deed and in a deed of agreement which was executed by the vendee that in case it was necessary to pay to the mortgagee more than what the vendor left with the vendee, the vendor would provide the balance and in case of his failure, the same could be recovered from him personally with interest and costs. *Held* that the stipulation in the sale-deed as to the vendor's personal liability was a 'contract to the contrary' and excluded the statutory charge provided by sec. 56—*Pirthiraj v. Rukmin*, 24 A.L.J. 527, A.I.R. 1926 All. 415, 95 I.C. 343.

The statutory charge under this section does not provide for interest and costs—*Pirthiraj v. Rukmin*, *supra*.

The principle of this section should not be applied to leases. See *Lowe & Co. v. Hazarimull*, 30 C.W.N. 183, 94 I.C. 786, A.I.R. 1926 Cal. 525.

Execution Sales:—The rule laid down in this section has been applied to execution sales—*Ram Lochan v. Ram Narain*, 1 C.L.R. 296; *Tadigabla v. Lakshmana*, 5 Mad. 385; *Bishonath v. Kishtomohan*, 7 W.R. 488; *Rodh Mal v. Ram Harakh*, 7 All. 711. But see contra—*Naubat v. Mahadeo*, 51 All. 606, 1929 A.L.J. 419, A.I.R. 1929 All. 309 (311), 116 I.C. 297, and *Rama Shankar v. Ghulam Hussain*, 43 All. 589 (594). In the last mentioned case, four villages L, P, S and D were mortgaged to a certain person. Out of these properties, P, S and D were sold in execution of a money-decree and purchased by A. The mortgagee then obtained a decree on his mortgage and in execution of it caused the village L, which still remained in the hands of the mortgagor, to be sold by auction. The amount realised being insufficient, the mortgagee caused the village D to be then sold. *Held* that this section would not apply since the sale in this case was a Court-sale (sale in execution of a money decree), that the property L would not be primarily liable for the mortgage-debt under this section but that all the four villages would rateably contribute to the mortgage-debt in accordance with the provisions of sec. 82.

Discharge of Incumbrances on Sale.

57. (a) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court, or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,—

Provision by Court for incumbrance, and sale freed therefrom.

(1) in the case of an annual or monthly sum charged on the property, or of a capital sum charged on a

- determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient by means of the interest thereof, to keep down, or otherwise provide for, that charge, and
- (2) in any other case of a capital sum charged on the property,— of the amount sufficient to meet the incumbrance and any interest due thereon.

But, in either case, there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court, for special reasons (which it shall record), thinks fit to require a larger additional amount.

(*b*) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(*c*) After notice served on the person interested in, or entitled to, the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(*d*) An appeal shall lie from any declaration, order, or direction under this section as if the same were a decree.

(*e*) In this section “Court” means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction; (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate; (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

This section, excepting the last two clauses, has been taken almost word for word from sec. 5 of the English Conveyancing Act, 1881.

“The chapter concludes with a section founded on 44 & 45 Vict. c. 41, (English Conveyancing Act) section 5, providing for the discharge of incumbrances on the sale of encumbered property either by the Court, or in execution of a decree, or out of Court. In case of an annual or

monthly sum charged on the property, this is done by paying into Court such amount as when invested in Government securities will be sufficient, by means of the interest, to keep down the charge. In case of a capital sum charged, the amount to be paid into Court is such as will be sufficient to meet the incumbrance and any interest due thereon. Thereupon the Court may declare the property free from incumbrance and make proper orders for giving effect to the sale and for applying the capital or income of the fund in Court. The corresponding section in 44 & 45 Vict c. 41 has been hailed in England as likely to effect one of the greatest reforms ever made in the law of real property, and there is reason to believe that it will be equally beneficial in India. But to prevent any chance of error in the exercise of a novel jurisdiction, the Indian Legislature has taken two precautions; first, it has confined the jurisdiction to the High Courts, the District Courts, and any other Courts especially empowered by the Local Governments; and, secondly, it has declared that an appeal shall lie from all directions and orders given under this section.”—Whitley Stokes’ *Anglo-Indian Codes*, Vol. I, p. 731.

Object of the section:—The power which under this section the Court may exercise in the case of any sale is intended to facilitate the alienation of incumbered estates by relieving the land from the incumbrance and substituting for the land another form of security. Shephard and Brown, 7th Edn., p. 218.

321. Application of section:—This section is inapplicable if a decree is obtained on the incumbrance; because in such a case the incumbrance merges in the decree and is taken as having ceased. The mortgagee of certain property obtained a decree for sale upon the mortgage. Thereafter, the petitioner negotiated with the mortgagor for the purchase of the property. The mortgagee having consented to obtain a certain sum in full satisfaction of the decree debt, the petitioner got from him a written undertaking to that effect. Thereupon the sale was completed. However, when the purchaser tendered the agreed sum, the mortgagee refused to receive it. The petitioner applied under this section for permission to pay into Court the sum agreed to be paid and for a declaration that the mortgaged property was free from the said incumbrance. *Held* that this section did not apply, because the mortgage had merged into the decree, and the question involved in this case was one of adjustment of the decree out of Court. But the petitioner was entitled to the declaration asked for, on payment of the money into Court, and the case was covered by sec. 244 (c) of the C. P. Code, 1882—*Mallikarjuna v. Narasimha*, 24 Mad. 412.

322. Procedure:—The words “upon the application of any party to the sale” show that the Court cannot act *suo motu*. It should exercise its power only on the application of either the vendor or the purchaser.

Again, the power of the Court under this section is discretionary. It will not, upon the application of the purchaser, *compel* the vendor to pay money into Court for the purpose of discharging an incumbrance upon the land, where the result of so doing would be to inflict great hardship on him, as for instance where the incumbrance is a perpetual rent-charge and the sum necessary to procure its discharge would be considerably in excess of the purchase money of the land—*In re Great Northern Railway Co. and Sanderson*, 25 Ch. D. 788 (793).

Under the English law, the giving of a notice to the incumbrancer is discretionary with the Court. In India, the Court is generally bound to give notice, unless in exceptional cases, the Court thinks fit to dispense with it, the reasons of which must be recorded in writing.

The amount to be deposited in Court shall include the interest of the incumbrance, as well as an extra-charge of one-tenth of the original amount. In England the law is the same—*Ambrose v. Ambrose*, 1 Cox. 194.

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

58. (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money; and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold, and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage, and the mortgagee a simple mortgagee.

(c) where the mortgagor ostensibly sells the mortgaged property—

on condition that, on default of payment of the mortgage-money on a certain date, the sale shall become absolute, or

on condition that, on such payment being made, the sale shall become void, or

on condition that, on such payment being made, the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale, and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Where the mortgagor delivers possession *or expressly or by implication binds himself to deliver* possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property, *or any part of such rents and profits*, and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage, and the mortgagee a usufructuary mortgagee.

(e) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) *Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, and in any other town which the Governor-General in Council may, by notification in the Gazette of India, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.*

(g) *A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section, is called an anomalous mortgage.*

Amendment:—The following amendments have been made by sec. 19 of the T. P. Amendment Act (XX of 1929):—

(1) A proviso has been added to clause (c). See Note 338.

(2) The italicised words have been added to clause (d). See Note 342.

(c) Clauses (f) and (g) defining equitable and anomalous mortgages respectively have been newly added; clause (f) has been

taken from the last para of sec. 59, and clause (g) from section 98 with certain modifications.

The reasons for the amendments have been stated below in proper places.

Early laws of mortgage:—In the early days of the British rule, mortgages were legislated for in Regulation I of 1798, and later on in Regulations XXXIV of 1803 and XVII of 1806, but these Regulations gave a somewhat cumbrous and unsatisfactory procedure, and were confined to *bye-bil-waffas*, *katkobalas*, and other *mortgages with possession*, and did not cover simple mortgages. “This form of mortgage never having been legislated for, there was no protection to the debtor. The practice was for the creditor to get a money-decree and sell up the mortgaged property without allowing any time for redemption. The sale being an ordinary execution sale of the right, title and interest of the debtor, whatever it might be, it was usual, when the same property was pledged to different creditors in different mortgage bonds, for each creditor to hold a separate sale, and leave the purchasers to fight out in Court the question of what they had bought under their respective sales. There being no machinery for bringing together in one suit the various incumbrancers on the property, endless confusion had been the result, and the decisions of the Court upon the almost insoluble problems arising from this state of things had been numerous and contradictory. The result was that the mortgaged property could not fetch anything like its value. The debtor was ruined, the honest and respectable money-lender discouraged and a vast amount of gambling and speculative litigation fostered. It has been one of the objects of this chapter to remedy those and other similar evils”—Speech of Hon’ble Mr. Evans on the Transfer of Property Bill (1882).

323. Definitions of mortgage:—In section 2 (17) of the Indian Stamp Act, a mortgage is defined as follows:—“Mortgage-deed includes every instrument, whereby, for the purpose of securing money advanced or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to or in favour of another, a right over or in respect of specified property.” This definition is much wider and more general than that given in the Transfer of Property Act, because it applies to any specified property both moveable and immoveable, (whereas a mortgage of moveable property is excluded from T. P. Act) and refers to the performance of an engagement and is not restricted to an engagement giving rise to a pecuniary liability only. The two definitions are materially different. For the purpose of ascertaining what stamp-duty is payable on an instrument alleged to be a mortgage, the definition of mortgage as given in the Stamp Act, and not that given in this Act, is to be referred to; but the definition given here, and not the definition given in the Stamp Act, should be the sole guide for ascertaining the nature of a transfer and the incidents to which it may be subject—*Empress v. Debendra*, 27 Cal. 587.

Another definition is to be found in sec. 1 of the Trustees and Mortgagees’ Powers Act:—“Mortgage shall be taken to include every instrument, by virtue whereof immoveable property is in any manner conveyed, pledged, or charged as security for the repayment of money or money’s worth lent, and to be reconveyed or released on satisfaction of the debt.” This definition is narrower than that given in the T. P. Act, in as much

as the purpose of the security is restricted to the repayment of a loan, and does not extend to the performance of an engagement. Moreover, it refers to an existing debt only, and not to a future debt.

The best definition of mortgage is that given in the present section. "Mortgage as understood in this country cannot be defined better than by the definition adopted by the Legislature in sec. 58 of the Transfer of Property Act. That definition has not in any way altered the law, but on the contrary has only formulated in clear language the notions of mortgages as understood by the writers of text books on Indian mortgages, and every word of the definition is borne out by the decisions of the Indian Courts of Justice"—*per* Mahmood, J., in *Gopal v. Parsotam*, 5 All. 121 (137).

The general definition of a mortgage is contained in clause (a) in which the general legal effect of a mortgage is predicated. The definitions of the various classes of mortgage contained in the several clauses should not be read as amplifying the *quantum* of interest which a mortgage by law confers upon the mortgagee. These clauses only prescribe the forms in which the various mortgages are to be expressed—*Ansur Subba Naidu v. Secretary of State*, 1917 M.W.N. 794, 41 I.C. 770. Further, in order to determine whether a mortgage falls under any of the classes enumerated in clauses (b) to (g), it is necessary first to refer to clause (a). Clauses (b) to (g) do not give any self-sufficient definition, and do not by themselves declare any transaction whatever to be a mortgage. It is clause (a) which declares what transactions are mortgages, and it is necessary to determine whether there is a mortgage at all before the subsequent clauses are referred to—*Mumtaz v. Lachhmi*, A.I.R. 1929 All. 174 (176), 116 I.C. 807.

324. Characteristics of the several mortgages:—

(1) *Simple mortgage*:—(a) The mortgagor undertakes *personal* liability. (b) No *possession* is delivered. (c) There is *no foreclosure* (sec. 67). (d) No power of sale out of Court, but a decree for sale of the mortgaged property must be obtained. (e) It must be effected by a *registered* instrument even if the consideration is below Rs. 100 (sec. 59).

(2) *Mortgage by conditional sale*:—(a) The mortgagor ostensibly *sells* the mortgaged property. (b) The condition is that the sale shall be absolute in default of payment on a particular date or that the sale shall be void on such payment and the property retransferred. (c) The remedy of the mortgagee is by *foreclosure* and not by sale (sec. 67). (d) It must be by registered writing if the consideration is Rs. 100 or upward; if less than Rs. 100, it may be effected by delivery of the property or by a registered instrument (sec. 59). (e) It must be created by *one document*, and not by two documents (one for sale, and another for agreement of repurchase).

(3) *Usufructuary mortgage*:—(a) There is delivery of *possession* to the mortgagee. (b) He is to retain possession until repayment of the money and to receive rents and profits or part thereof in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money. (c) There is redemption when the amount due is personally paid or is discharged by rents and profits received. (d) There is no remedy by sale or foreclosure (sec. 67). (e) If for Rs. 100 or upwards, it must be registered; if below Rs. 100, it may be by registered deed or by delivery of the property (sec. 59).

(4) *English mortgage*:—(a) It is followed by delivery of possession. (b) There is a personal covenant to pay the amount. (c) It is effected by absolute transfer of property with a provision for re-transfer in case of repayment of the amount due. (d) The remedy is by sale and *not by foreclosure* (sec. 67). (e) Power of sale out of Court is conferred on certain persons under certain circumstances (sec. 69).

(5) *Equitable mortgage*:—(a) It is created in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, etc. (b) It is effected by deposit of material title-deeds; no delivery of possession takes place. (c) It is made to secure a debt or advances already made or to cover future advances. (d) No registration is necessary even if there is a writing recording the deposit (sec. 59). (e) The remedy is by sale and not by foreclosure (sec. 67). All provisions in this chapter relating to a simple mortgage are applicable to equitable mortgages (sec. 96).

(6) *Anomalous mortgage*:—(a) It now includes a simple mortgage usufructuary and a mortgage usufructuary by conditional sale. (b) Possession may or may not be delivered. (c) The remedy is by sale; or by foreclosure, if the terms of the mortgage permit it (sec. 67). (d) If for Rs. 100 or upward it must be registered; if below Rs. 100, it may be by registered deed or by delivery of possession (sec. 59).

Enumeration not exhaustive:—This section enumerates six kinds of mortgages. But the Transfer of Property Act was not intended to be exhaustive. There are many mortgages known to English law which it would be difficult or impossible to bring within the terms of this Act, yet there can be no doubt that such mortgages would be enforceable in India—*Bhupendra v. Wajihunnissa*, 2 P.L.J. 293 (300), 39 I.C. 564.

325. Construction:—In construing deeds of mortgage, effect should be given to the *intention* of the parties; and this intention can be gathered from the terms of the deed. It is not the *name* given to a contract by the parties that determines the nature of the transaction. It is the contents of the agreement, the jural relation constituted by it, that determines whether it is really a conveyance, a lease, a mortgage or a contract of some other nature—*Abdul Bhai v. Kashi*, 11 Bom. 462; *Karam Chand v. Faqir*, A.I.R. 1929 Lah. 489. Thus, a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him. *Held*, that the deed was a sale liable to be converted into a mortgage, though it was named by the parties as a mortgage deed—*Jamnadas v. Brijbhukhan*, 2 Bom. 113. So also, as long as the nature of the transaction is substantially such as to classify it as belonging to a particular kind of mortgage, the mere calling it by a different name will not relegate it to another class—Macpherson on Mortgages, p. 127. But although generally speaking the name given by the parties to a document is not conclusive as to its nature, still the designation is not always to be lost sight of, especially where the document is ambiguous and is susceptible of more than one construction as to its nature and scope

—*Kalabhai v. Secretary of State*, 29 Bom. 19. And so Butler in his edition of *Coke on Littleton*, writes:—"It may be laid down as a general rule, and subject to a very few exceptions, that where a conveyance or assignment of an estate is originally intended and as a security for money, whether this intention appear from the deed itself or by any other instrument, it is always considered in equity as a mortgage and redeemable, even though there is an express agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time or to a particular description of persons."

326. Agreement of mortgage—Specific performance:—A mortgage is an accomplished transfer, and as such creates a right *in rem*; but a mere agreement of mortgage between the intending debtor and creditor does not create any such right, and such an agreement is not capable of specific performance, *i.e.*, the Court cannot compel the parties to borrow or lend the money—*Rogers v. Challis*, (1859) 27 Beav. 175 (178, 179); *Sichel v. Mosenthal*, (1862) 30 Beav. 371 (377). The defendant agreed to borrow a sum of money from the plaintiff on certain security. The defendant afterwards obtained better terms from a third person and refused to perform his agreement with the plaintiff, who then brought a suit for specific performance. *Held* that such a suit would not lie—*Rogers v. Challis* (*supra*); *South African Territories Ltd. v. Wellington*, [1898] A.C. 309 (in this case it was held that damages would be the adequate relief). The case of *Sichel v. Mosenthal*, (*supra*) was a converse case, and there a suit to compel a man to lend money was dismissed, and the Judge suggested that the proper remedy was an action for damages.

A contract to lend money cannot be specifically enforced. But the case of a usufructuary mortgage stands on a different footing, particularly when *possession has been delivered* and the stipulation is that the profits are to be set off against the interest. If, in such a case the mortgagee does not pay the amount contracted to be paid, a suit will lie to recover the money. Here the executant has performed his part of the contract (by delivering possession) but the transferee has not done so. The suit is not really one for specific performance of a mere contract to lend money, but to compel the mortgagee to perform his part of the contract when he has obtained delivery of possession—*Sheopati v. Jagdeo*, 52 All. 761, 1930 A.L.J. 1141, A.I.R. 1931 All. 95 (97), 124 I.C. 764. If the usufructuary mortgagee fails to pay a portion of the amount contracted to be paid, the mortgagor is entitled to bring an immediate suit for recovery of the money, instead of going into an account in future when a suit for redemption would be instituted—*Ibid*.

Where the mortgagee *has advanced* the money but the mortgagor refuses to execute a mortgage, the former can bring a suit for specific performance for compelling the mortgagor to execute a deed of mortgage, though of course it will be open to the latter to elect to repay the loan. Ghose's *Law of Mortgage*, 5th Edn., pp. 74-75. Where an agreement between a Company and H provided that "all stock-in-trade of the Company shall be under hypothecation to H, and that the Company will soon execute in favour of H a regular deed of mortgage of the land, etc., for the sum of Rs. five lakhs to meet any deficit that may be due to H for the advances made by him after availing of the stock under hypothecation to H as aforesaid," *held* that the agreement created a right in H to obtain a regular deed of mortgage which was to be executed by the Company—

Hukumchand v. Radha Kishen, 34 C.W.N. 506 (511) (P.C.), A.I.R. 1930 P.C. 76, 123 I.C. 157, 32 Bom.L.R. 533, 58 M.L.J. 453.

An agreement to execute a mortgage of immoveable property does not by itself constitute a mortgage or a charge upon the property—*Hukum Chand v. Radha Kishen*, *supra*.

327. “Transfer of interest”—mortgage and charge distinguished:—According to the definition given in this section, the first requisite of a mortgage is that there should be a *transfer* of an interest in immoveable property. The interest transferred depends upon the character of the mortgage. In a simple mortgage, the interest conveyed is the right to cause the property to be sold. In a mortgage by conditional sale and in an English mortgage, the actual ownership is transferred, subject, however, to a condition. In a usufructuary mortgage, the transfer made is of the right of possession and enjoyment of the usufruct.

A mortgage is a *transfer* of an interest and in this respect it differs from a *charge*. A charge-holder is only entitled to have his claim satisfied out of a particular property, but neither that property nor any interest therein is *transferred* to him. It is only by virtue of a decree for sale that an interest in the property can pass to him—*Gobinda v. Dwarka Nath*, 35 Cal. 837 (841); *Rajah Siva Prasad v. Beni Madhab*, 1 Pat. 387 (392); *Altaf Begam v. Brij Narain*, 51 All. 612, 116 I.C. 855, A.I.R. 1929 All. 281; *Khemchand v. Mallo*, 10 N.L.R. 81, 26 I.C. 601. “The broad distinction between a mortgage and a charge is this, that whereas a charge only gives right to payment out of a particular fund or particular property without *transferring* that fund or property, a mortgage is in essence a *transfer* of an interest in specific immoveable property. The line of division between a charge and a mortgage in England is a very clear one but in this country the division is not so well marked; and in fact there is very little difference between a charge and a simple mortgage as defined in this section”—*per* Das, J. in *Raja Siva Prosad v. Beni Madhab*, *supra*. Where a mortgagor having already mortgaged his lands with possession to the mortgagee, takes a further advance from him, on the security of the land already mortgaged, the second transaction does not amount to a fresh transfer of the land, consequently it is merely a charge and not a mortgage (under the Punjab Alienation of Land Act). But the case is different if the second transaction purports to cancel the earlier one or contains conditions substantially different from those contained in the original mortgage or an additional area of land—*Sher Singh v. Daya Ram*, 12 Lah. 660, A.I.R. 1932 Lah. 465, 139 I.C. 49 (F.B.). In the absence of any express words indicating a transfer of an interest in specific immoveable property, a document which entitles the creditor to recover his dues by attachment and sale of the property, and which contains a covenant against alienation does not create a mortgage but merely effects a charge—*Royzuddi v. Kali Nath*, 33 Cal. 985. The difference between the two is material in this respect that while the transfer of an interest creates a right *in rem* which is available against all subsequent transferees irrespective of *notice*, a plea of purchase without notice is a good defence against a prior claimant who has merely a charge falling short of an interest in the property—*Kishun Lal v. Ganga Ram*, 13 All. 28. In other words, a mortgagee can follow the mortgaged property in the hands of any transferee from the mortgagor, whereas a charge can be enforced against

a transferee only if it is shown that he has taken with notice of the charge—*Royzuddi v. Kali Nath*, 33 Cal. 985. This is now expressly provided in sec. 100. A mortgage is created only by act of parties, while a charge may be created either by act of parties or by operation of law. (See sec. 100).

It is not essential for the creation of a mortgage that there should be an *express* transfer of interest. It is sufficient if the instrument taken as a whole operates such transfer—*Kola Venkatanarayana v. Vuppala Ratnam*, 29 Mad. 531 (533); *Balasubramania v. Sivaguru*, 21 M.L.J. 562, 11 I.C. 629 (632); *Ramabrahman v. Venkatanarasu*, 23 M.L.J. 131, 16 I.C. 209 (210); *Venkatarama v. Suppa Nandan*, 27 M.L.J. 58, 24 I.C. 24. In a simple mortgage, the interest transferred is the right to have the property sold, and this need not necessarily be provided for in the deed in so many words; it may be inferred from the language used, and where such an agreement can be inferred, then there is a transfer of an interest—*Dalip Singh v. Bahadur*, 34 All. 446; *Har Prasad v. Ram Chunder*, 44 All. 37 (44) (F.B.), 19 A.L.J. 807, 63 I.C. 750. Such a transfer may be implied from the nature of the transaction and the circumstances of the case. Thus, where a document, hypothecating a house as security for the payment of a debt, contained a full description of the boundaries of the house, and consolidated the several amounts due on prior mortgages of the same house, and further contained a covenant to pay, with an undertaking not to redeem a certain usufructuary mortgage before the present mortgage was redeemed, *held* that the parties intended to create a mortgage, that if it lacked apt words in expressing the transfer of interest, the defect was due to the imperfect power of expression of their minds, and that it was improbable that the creditors would have accepted a mere personal bond in substitution for two prior mortgages—*Ponnu-ranga v. Thandavarada*, 1915 M.W.N. 21, 26 I.C. 274; see also *Har Prasad v. Ram Chunder*, (*supra*). Though a deed does not expressly contain any words involving a transfer of any specific interest in immoveable property, still if it contains a provision “that as a guarantee for the repayment of the principal money we hereby *mortgage and hypothecate* the properties mentioned below, and we further declare that until repayment of this debt we shall not transfer the properties in any way,” *held* that the deed is a valid mortgage and not a charge—*Ananda Ram v. Dhanpat*, 1 P.L.J. 563 (567, 568), 38 I.C. 37; *Sheoratan v. Mahipal*, 7 All. 258 (264) (F.B.). A bond contained the following words: “I am borrowing Rs. 300 from you, and executing this mortgage bond. . . . I promise to pay the money in the month of Magh, 1299. . . . As security for the payment of the money I do mortgage the following properties. . . . Until the said money is paid up I shall not alienate these properties in any way. If I raise any dispute in paying the money, you should institute a suit and recover the money by attachment and auction-sale of the said properties.” *Held* that the deed created a mortgage and not a mere charge, although there was no transfer of any interest—*Nabin Chand v. Raj Coomar*, 9 C.W.N. 1001 (1002). In fact, this is the usual form in which mortgage bonds are drawn up in this country, and it is the universal judicial practice to treat documents in this form as simple mortgages—*Ibid*. The word ‘panayam’ when used in documents executed in Malabar means a mortgage, if the property covered by the ‘panayam’ deed is immoveable property; and when such a document contains a

personal covenant by the mortgagor to pay the amount, the document is a document of simple mortgage, even if the transfer of interest is not formally expressed in it—*Samandan v. Mamkoth*, 33 M.L.J. 679, 42 I.C. 349. Where a document calling itself *diggu bhogyam* (a telegu word for usufructuary mortgage) provided that the creditor should receive rents and profits from a tenant in possession of the land for a certain number of years for the total of the principal and interest due, and it recited that the consideration was taken on the security of the land, *held* that the document was a mortgage-deed, as there was a transfer of an interest in immoveable property, and not merely an assignment of the income for the period—*Anantha Iyer v. Ramaswami*, 1914 M.W.N. 891, 26 I.C. 71.

But where a security bond, after reciting an order of the Court made upon an application that the possession of certain immoveable property should not be delivered over to the plaintiff, stated that “we have for a sum not exceeding Rs. 300 made the properties mentioned below security,” *held* that the document did not transfer an interest in the property but that it merely created a charge and not a mortgage—*Rama Chariar v. Doraswami*, 29 I.C. 605 (Mad.). A deed set out that the executant had borrowed a sum of money. Certain immoveable properties were specified without anything more. There was a covenant to repay and also a covenant not to alienate until repayment of the loan. *Held*, that there was merely an undertaking by the borrower not to alienate the property until the loan was repaid; but there was no transfer of an interest in the property to the creditor, nor did it give the creditor a right to put the property to sale; therefore the transaction was not a mortgage within this section and it is doubtful also whether it even created a charge on the property—*Mohan Lal v. Indomati*, 39 All. 244 (251, 252) (F.B.); *Jawahir v. Indomati*, 36 All. 201 (*per* Richards, C.J.).

327A. There must be a mortgagee:—A mortgage is a *transfer* of an interest; consequently, there must be a *person* to whom the interest is transferred. A security bond for refund of sale proceeds in case of reversal of the decree in Appellate Court, does not amount to a mortgage-deed, firstly because it does not expressly say that it is a hypothecation or mortgage, and secondly because it does not *mention any person* to whom the security is given. The liability is undertaken to the Court, but the Court is not a juridical person, and it can neither sue nor take the property nor assign it. The security bond does not even amount to a *charge*, because in a charge also there must be a specific person in whose favour it is created—*Mehdi Ali v. Chunni Lal*, 1929 A.L.J. 902, 119 I.C. 81, A.I.R. 1929 All. 834 (835, 836).

328. ‘Specific’ immoveable property:—The next requisite of a mortgage is that the immoveable property must be distinctly specified. The property intended to be mortgaged must be described so that it may be readily recognised and identified—*Najibulla v. Nasir*, 7 Cal. 196 (198); *Bhoneswar v. Ram Khelawan*, 5 I.C. 654. The object of having the property defined specifically is to render the identification as easy as possible, and to shut the door against fraud and controversy—*Carpenter v. Deen*, 23 Q.B.D. 566 (at p. 574). Thus, where under a bond the obligor agreed that if the principal and interest be not paid up within the stipulated period, the obligee would have liberty to realise the amount due from “my moveable and immoveable property,” *held* that the language of the

bond was too vague to create a charge on any *definite* estate—*Collector v. Betti Moharani*, 14 All. 162; *Baldeo Rai v. Murli Rai*, 10 A.L.J. 120, 16 I.C. 638. A mortgage of “my house and landed property” is void for uncertainty—*Darshan Singh v. Hanwanta*, 1 All. 272. But see *Ramsidh v. Balgovind*, 9 All. 158. Where the obligors of a bond described themselves as residents of a certain place and said that they pledged their property for a debt, the hypothecation was held to be too indefinite to be acted upon. But if they had described themselves as the owners of certain property and then gone on to pledge their rights and interests therein, the case would have been different—*Deojit v. Pitambur*, 1 All. 275. For instance, where the mortgagor described certain property as belonging to him and then recited that “my rights and property in the aforesaid talook shall remain pledged and hypothecated for this debt,” *held* that the recital created a good mortgage as the property was clearly defined—*Bishan Dayal v. Udit Narain*, 8 All. 486. Where the property was described, as “villages granted to the executant by Government in perpetuity,” *held* that the property was sufficiently identified, although the names of the villages were not mentioned—*Kanhia Lal v. Muhammad*, 5 All. 11. See also *Land Mortgage Bank v. Abdul Kasim*, 26 Cal. 395 (P.C.). A deed describing the mortgaged property as “my zemindary property” without any further specification was *held* not void for uncertainty, as the words were capable of being made certain by proof of the mortgagor having at the date of the deed owned a specific zemindary interest—*Shadi Lal v. Thakur Das*, 12 All. 175. A document of mortgage did not give the boundaries of the lands, but specified them as “my *jirayati* and *inam* lands which I own at the village of my residence.” *Held* that the description was sufficient to satisfy the requirements of this section and that it created a mortgage—*Dakkata v. Sasana-puri*, 1 L.W. 96, 22 I.C. 524.

329. Consideration of mortgage:—A mortgage must be supported by consideration; without consideration a mortgage becomes unenforceable and no charge can be created on the property—*Ramasami v. Sundara*, 23 I.C. 805 (Mad.); *Kumarappan v. Narayana*, 35 I.C. 455 (Mad.); *Ralla Ram v. Malawa Ram*, 123 P.W.R. 1911, 12 I.C. 308.

The consideration of a mortgage may be either (1) money advanced or to be advanced by way of loan; (2) an existing or future debt; or (3) the performance of an engagement giving rise to a pecuniary liability.

‘Money advanced’ includes “existing debt” and something more, for it will comprehend a debt which has become barred by limitation or otherwise irrecoverable, whereas an ‘existing debt’ means a debt which is not so barred.

“For the purpose of securing, etc.”:—A mortgage is created for the purpose of securing a debt or other obligation. A transfer which is made by way of *discharging* a debt is not a mortgage—*Nidha Sah v. Murli*, 25 All. 115 (P.C.); *Abdulhai v. Kashi*, 11 Bom. 462.

Money advanced:—By the terms of an agreement entered into by the plaintiff and defendants, a pending suit was compromised, and payment of an ascertained balance found due from the plaintiff was secured by the defendants (creditors) being placed in possession of the plaintiff’s lands for a certain number of years, with the right of enjoying all rents and profits thereof subject to the payment of a fixed rent, part of which was to be paid to the plaintiff and the remainder to be retained by the creditors towards payment of the debt. *Held* that the agreement was a

mortgage, and redeemable on the usual terms—*Mashook Ameen v. Marem Reddy*, 8 M.H.C.R. 31. Similarly, a document whereby the executant gave possession of his land to his creditor to secure his debt and to have the debt discharged out of the rents and profits, was held to be a mortgage—*Venkateswara v. Keshava*, 2 Mad. 187.

'To be advanced':—A mortgage may be given not only for an existing debt but also as a security against advances to be made in future. Such a case may arise where for instance a mortgage is given as a running security for the balance of an account—*Henniker v. Wigg*, 4 Q.B. 792. Where the mortgagor allows a portion of the mortgage money to remain with the mortgagee in a deposit account in such a way that he could draw upon it and obtain the money at any time, the consideration of the mortgage is not only the money actually taken, but also the money left in the hands of the mortgagee and 'to be advanced' when occasion requires—*Hari Ram v. Sheo Doyal*, 11 All. 136.

Future debt:—A mortgage-deed provided: "The mortgagee shall enjoy the profits of the mortgaged land in lieu of interest. I, the executant, shall continue to pay to the mortgagee every year the deficiency in the amount of interest; and in case of default of payment of the same in any year the mortgagee shall in that year have power to recover it from a nine-anna Zemindary share, and other moveable and immoveable property." Held that the document created a valid mortgage of the nine-anna Zemindary share for securing the payment of deficiency of interest that might arise in future—*Bhola Das v. Bish Nath*, 10 A.L.J. 162, 16 I.C. 982.

A bond addressed to the Registrar of the High Court was as follows: "We the appellants to England put a portion of our Zemindary as per schedule in security for the Rs. 4000, being the amount of costs of the respondents to England, stipulating that till passing of an order by the Privy Council we shall not sell, mortgage or create encumbrance of any other kind." Held that the bond amounted to a mortgage, because its effect was to transfer to the Registrar an interest in specific immoveable property to secure a future debt which might become due from the appellants to the respondents—*Tokhan v. Girwar*, 32 Cal. 494 (496); *Girindra v. Bejoy Gopal*, 26 Cal. 246 (249); *Nagaruru v. Tangatur*, 31 Mad. 330 (332). But see *Janki Kuar v. Sarup*, 17 All. 99 (102).

Contingent liability:—The hypothecation of property for the purpose of securing a future liability to pay the mortgage-money in case the mortgagee should be deprived of possession of the mortgaged property, amounts to a mortgage, because a mortgage can be created for the discharge of a contingent liability—*Nand Lal v. Dharamdeo*, A.I.R. 1925 Pat. 288, 78 I.C. 457. Ghose's Law of Mortgage, 5th Edn. p. 198.

Engagement giving rise to a pecuniary liability:—The word "engagement" is not defined either in this or the Contract Act, but it clearly means a contract as defined in sec. 2 of the latter Act. Thus, where the object of the mortgage was to secure the delivery by the mortgagors of a certain quantity of indigo on a certain day, and the parties had assessed the amount of the pecuniary liability which might arise in anticipation of a breach, the mortgage was held to be valid, being for the purpose of securing the "performance of an engagement" as provided by the definition. See Macnaghten's Mortgage, 7th Ed., p. 654. See also *Bhola Das v. Bish Nath*, 10 A.L.J. 162, 16 I.C. 982, cited above, which was a case of

mortgage for securing the performance of an engagement, *viz.*, the payment of deficiency of interest.

The term "pecuniary liability" means a legal obligation to pay damages whether liquidated or not—*Naib Ram v. Shib Dut*, 5 All. 238. A vendor executed a document of indemnity agreeing that if any prior lien or charge should be disclosed on the property, he would repay the whole money with interest, and he hypothecated certain property to secure repayment of the money; *held* that there was clearly an engagement which gave rise to a pecuniary liability and that the terms amounted to a mortgage—*Niaz Ahmad v. Mangu Lal*, 5 A.L.J. 723; *Narayanasamy v. Ramasamy*, 12 L.W. 674, 60 I.C. 611. The defendant borrowed paddy from the plaintiff and executed a bond agreeing to repay the paddy with interest thereon (payable in paddy), and as security for the realisation of the paddy, hypothecated certain immovable property. The bond provided that in default of payment of the paddy the plaintiff would be entitled to realise the claim with interest thereon by sale of the property hypothecated. *Held* that the transaction was a mortgage. The essence of the matter was that the land was made security for the *value* of the paddy, because upon failure to deliver the paddy the mortgagee became entitled to recover the *price* thereof by sale of the land. So, the parties entered into an engagement which, if not performed by the delivery of the paddy, would give rise to a *pecuniary* liability—*Ramchand v. Iswar Chandra*, 48 Cal. 625 (632) (F.B.), 25 C.W.N. 57, 61 I.C. 539.

330. Part-payment of consideration:—A mortgage does not cease to be enforceable merely because only a *part* of the consideration has been paid and the balance remains unpaid. The mortgagee is entitled to a lien on the mortgaged property to the extent of the amount actually advanced—*Venkatapathi v. Venkata*, 47 I.C. 563 (Mad.); *Navunni v. Ramaswami*, 52 I.C. 738, 10 L.W. 169; *Zemindar of Karvetnagar v. Subbaraya*, 1918 M.W.N. 146, 43 I.C. 871; *Makhan Lal v. Hanumanbaksh*, 2 P.L.J. 168, 38 I.C. 877; *Bajrangi Sahai v. Udit Narain*, 10 C.W.N. 932; *Rajani Kumar v. Gour*, 35 Cal. 1051 (1057); *Rashik Lal v. Ram Narain*, 34 All. 273; *Rajai Tirumal v. Pandla Muthial Naidu*, 35 Mad. 114, 9 I.C. 289; *Motichand v. Sagun*, 29 Bom. 46; *Bhagabati v. Narayan*, 31 Bom. 552. See also *Hukmichand v. Pioneer Mills Ltd.*, 2 Luck. 299, A.I.R. 1927 Oudh 55 (58), 99 I.C. 483. Thus, where a part only of the money mentioned in the mortgage-deed has been advanced, and there is no suggestion that the mortgagor has cancelled the contract or that he had power to do so, the mortgage is perfectly valid to the extent of the money actually advanced, and the mortgagee is entitled to a decree—*Bajrangi Sahai v. Udit Narain*, *supra*. Where part of the consideration is void or fails or the mortgagee makes default in paying it, the right principle seems to be that the mortgage is good to the extent of the consideration that has validly passed—*Rajai Tirumal v. Pandla Muthial*, 35 Mad. 114 (118) dissenting from *Subba Rau v. Deva Shetti*, 18 Mad. 126. "If the mortgagee advances only a part of the sum contemplated in the mortgage, it is a valid security for so much as he does advance and for so much only. For the advance actually made, the mortgage is good against the mortgagor's assignee in bankruptcy"—Jones on Mortgages, Vol. I, Sec. 387. Where the execution and registration of a bond have created in favour of the mortgagee a transfer of an interest in the mortgaged property, the mere non-payment of a portion of the consideration does not render the bond inoperative and invalid, *unless*

there was an intention on the part of the parties that the terms of the bond would not be given effect to until the entire consideration money was paid. This intention is to be proved in each case—*Makhan Lal v. Hanumanbaksh*, 2 P.L.J. 168 (174, 175), 38 I.C. 877.

Remedy of mortgagor:—Where the mortgagee paid only a portion of the consideration of the mortgage, a suit by the mortgagor to compel the mortgagee to pay the balance of the consideration is not maintainable; but it is open to the mortgagor to sue the mortgagee for damages for breach of the agreement to lend money or he may redeem the mortgagee on payment of the amount actually received—*Anakaran v. Saidamadath*, 2 Mad. 79; *Yadavendra v. Srinivasa*, 47 Mad. 698 (699), A.I.R. 1925 Mad. 62, 80 I.C. 5; *Sheikh Galim v. Sadarjan*, 43 Cal. 59 (61, 63).

331. Mortgage-money—Interest:—A mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under a mortgage as a charge upon the mortgaged property; and the mortgagor, at the time of redemption, is bound to pay the interest also, and not the principal debt alone—*Ganga Ram v. Natha Singh*, 5 Lah. 425 (427, 428) (P.C.), A.I.R. 1924 P.C. 183, 80 I.C. 820, 29 C.W.N. 558; *Badhawa v. Akbar Ali*, 9 Lah.L.J. 428, 103 I.C. 752 A.I.R. 1927 Lah. 817 (819); *Ram Kishore v. Ram Nandan*, 25 A.L.J. 1086, A.I.R. 1928 All. 99 (101), 108 I.C. 149; *Abbas v. Ramdas*, 9 Lah. 140, A.I.R. 1928 Lah. 342 (343), 112 I.C. 153; *Ram Ratan v. Aditya*, 3 Luck. 459, 112 I.C. 481, A.I.R. 1928 Oudh 273 (275). Even though the mortgagors make themselves personally liable for the payment of the interest, such personal liability is not incompatible with the fact that the interest forms also a charge on the property—*Manghi v. Dial Chand*, 27 P.L.R. 643, A.I.R. 1924 Lah. 624, 96 I.C. 477. So also, the mere fact that there is an express reference to interest in the personal covenant, and no express reference to interest in the hypothecation clause, does not show that interest is not charged on the property—*Rang Raj v. Sheonarain*, 9 P.L.T. 785, A.I.R. 1928 Pat. 398 (399), 110 I.C. 594.

The mortgaged property is liable to be sold not only for the principal sum secured but also for the interest—*Jainandan v. Baij Nath*, 2 P.L.T. 229, 63 I.C. 297 (301). But this section does not enable a mortgagee to make a claim to interest which is not given to him by the mortgage-bond. Thus a property was mortgaged with possession to the plaintiff; under the terms of the mortgage the profits were to be enjoyed in lieu of interest and if after the stipulated period the principal amount was not paid, it was to be recovered without interest by sale of the mortgaged property. *Held* that under the terms of the bond the property was a security only for the amount borrowed and not for interest, that the interest was payable only out of the profits, and the plaintiff was entitled to recover only the principal amount by sale of the mortgaged property—*Manik Chand v. Rangappa*, 45 Bom. 523 (526, 527), 22 Bom.L.R. 1435, 59 I.C. 765. See also *Nam-malwar v. Krishnaswami*, 16 L.W. 743, A.I.R. 1923 Mad. 71, 72 I.C. 987.

Post diem interest:—Unless the terms of a mortgage document show that it was the intention of the parties that no interest should be paid subsequent to the date when the mortgage falls due, *post diem* interest is payable till the date when the money is actually realised by the mortgagee. Even though the mortgage is an English mortgage and confers a power of private sale on the mortgagee in default of payment of principal on the due date, still the mortgagee will be entitled to *post diem* interest, and he is not bound to exercise the power of sale under penalty of losing his right

to subsequent interest—*Agnes Campbell v. Audikesavalu*, 20 L.W. 153, 82 I.C. 399, A.I.R. 1924 Mad. 736 (740). When the deed is silent as to the payment of *post diem* interest, the presumption is that the mortgagor will continue to pay interest at the stipulated rate calculated up to the time of tender or payment or the institution of a suit by the mortgagee—*Mahadeo v. Dhiraj*, 44 All. 772 (774), following *Mathura Das v. Raja Narindra*, 19 All. 39 (P.C.); *Bindesri v. Ganga Saran*, 20 All. 171 (P.C.); *Sarala v. Jogendra*, 25 Cal. 246; *Amar Singh v. Baij Nath*, A.I.R. 1926 Oudh 378, 93 I.C. 958. The Lahore High Court also holds that if the mortgagor fails to make payment of the mortgage-debt within the stipulated time, and the deed contains no express provision for the payment of interest after the due date, the mortgagee is entitled to damages for non-payment of the debt in due time, and the measure of damages would usually be the same as the *rate of interest* stipulated for by the parties—*Budhu v. Niamat*, 4 Lah. 406, 75 I.C. 375, A.I.R. 1923 Lah. 632 (633); *Motan Lal v. Muhammad Bakhsh*, 3 Lah. 200 (F.B.), 66 I.C. 771, A.I.R. 1922 Lah. 254; *Abbas v. Ramdas*, 9 Lah. 140, 140, A.I.R. 1928 Lah. 342 (344), 112 I.C. 153.

332. When mortgage takes effect:—In the absence of a contract or stipulation to the contrary, a mortgage is complete and a 'transfer of interest' is effected, not when the consideration for it is paid or made good, but when the mortgage-contract is entered into regardless of whether and when consideration is paid or made good. The covenant or stipulation to the contrary may be express or implied, the question in such cases being—when did the parties intend that the transfer should take effect? The presumption would be in favour of immediate transfer, but this presumption could be rebutted by proof of an express stipulation to the contrary or by proof of facts and circumstances from which a contrary intention might reasonably be inferred—*Allah Ditta v. Nazar Din*, 53 P.R. 1916 (F.B.). A mortgage is perfected by registration, and unless the bond provides to the contrary it takes effect from the date of registration and not from the date when the consideration money is subsequently paid. The words "future debt" show that a mortgage will become effective even though the consideration has not yet been paid. Therefore, where after the registration of a mortgage the mortgagor sold the property to a third person by a registered deed, and subsequently the mortgagee paid the consideration money for the mortgage to the mortgagor, *held* that mortgagee's right prevailed over that of the vendee—*Raghunath v. Amir Baksh*, 1 Pat. 281, 3 P.L.T. 307, 65 I.C. 329, A.I.R. 1922 Pat. 299. The language of sec 58 is clear, and unless the parties contemplated the bringing into existence of the mortgage on a future date, the rule is that the mortgage takes effect on the date of execution of the mortgage, even though it is made to secure a future debt. And a second mortgagee cannot obtain priority on the ground that the time when the first mortgage was created there was no debt owing from the mortgagor to the first mortgagee—*Narayanasamy v. Ramasamy*, 12 L.W. 674, 60 I.C. 611 (613).

SIMPLE MORTGAGE:—*Vernacular names:*—In Bengal a simple mortgage is called *Bandhaki Khat* or *Rehan*; in U. P. it is known as *Rehan*, *Arh* or *Mushtaghraq* with grammatical variations. In Bombay, it is called *drista bandhaka*, *nazar gahana* or *taran gahan*. In Madras it is designated as *drista bandhaka* or *Idu adamanam*. In the Ganjam district, it is known by the name of *Tanaka*.

333. Incidents of simple mortgage:—In order that there may be a simple mortgage there must be (a) a transfer of an interest in specific immoveable property; (b) a personal undertaking by the mortgagor to pay the mortgage-money; and (c) an agreement express or implied that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have the right to cause the mortgaged property to be sold—*Dalip Singh v. Bahadur*, 34 All. 446. The mortgagee, in the case of a simple mortgage, has, in the event of default being made in the payment of the debt, two causes of action, the one arising out of the breach of the personal obligation, and the other arising out of the contract of hypothecation. He may put both these causes of action in suit at once or he may pursue the one remedy at one time and the other at another. If he sues on the personal undertaking only, he obtains what is known as a money-decree; if he sues on the contract of hypothecation, he obtains an order for the sale of the property—*Wahid-un-nisa v. Gobardhan*, 22 All. 453. Both remedies may be pursued at the same time, although of course the claimant cannot recover more than the amount due on the obligation—*Muni Reddi v. Venkata*, 3 M.H.C.R. 241. His failure to seek one or other of the two remedies in the same suit does not in any case bar his right to enforce the remaining remedy by a separate suit, since the causes of action in the two cases are different—*Piari v. Khiali Ram*, 3 All. 857.

Notwithstanding the pledge, the mortgagor remains the owner of the property, and may deal with it in any manner he pleases, not inconsistent with the condition of the mortgage. Subject to the charge created by the mortgage, he may alienate his property in part or wholly—*Wahid-un-nissa v. Gobardhan*, 22 All. 453.

334. Covenant to pay:—A covenant to pay is an *essential element* of a simple mortgage, and in this respect it differs from a charge. If there is a covenant to pay, it is not necessary that there should be an express transfer of an interest or an express power to bring the property to sale—*Rama Brahman v. Venkatanarasu*, 23 M.L.J. 131, 16 I.C. 209 (210); *Balasubrahmaniam v. Sivaguru*, 21 M.L.J. 562 (568), 11 I.C. 629 (632).

335. No delivery of possession:—The outstanding characteristic of a simple mortgage is that possession is not delivered to the mortgagee, but remains with the mortgagor. If possession subsequently passes to the mortgagee, that possession cannot be explained or accounted for by the instrument of simple mortgage—*Maung Ok v. Ma Pu*, 4 Rang. 368 (F.B.), A.I.R. 1927 Rang. 33 (34), 99 I.C. 519. Where possession is not delivered to the mortgagee, but there is merely a stipulation in the deed that if the mortgagor fails to pay interest in any year, he will deliver the property to the possession of the mortgagee, it does not convert the simple mortgage into a usufructuary mortgage—*Yashvant v. Vithal*, 21 Bom. 267 (272); *Lingam Krishna v. Sri Mirza*, 15 C.W.N. 441 (443) (P.C.), 21 M.L.J. 1147, 10 I.C. 72; *Rajah Sethrucherla v. Maharaja of Jaypore*, 1916 M.W.N. 354, 35 I.C. 411 (412); *Ramayya v. Venkatarama*, 13 M.L.J. 2; *Sochet Singh v. Hadayatullah*, 13 Lah. 508, A.I.R. 1932 Lah. 630 (632). In *Lalta Prasad v. Hari Lal*, 16 O.C. 90, 19 I.C. 748, this kind of mortgage was treated as a combination of a simple and usufructuary mortgage, in this sense that it was convertible from a simple mortgage-bond into a usufructuary mortgage on the happening of a certain event, and until that contingency happened all conditions of a simple mortgage ap-

pertained to it. It seems that this sort of mortgage would now fall under the new definition of anomalous mortgage given in clause (g) of this section.

336. Right to have the mortgaged property sold:—The most essential of the elements which constitute a simple mortgage is the *right to cause the property to be sold*—a right without which the transaction, whatever else it may be, certainly cannot be called hypothecation, pledge, or simple mortgage. This right does not come into existence when the actual sale takes place by virtue thereof, but it comes into existence at the time when the mortgage is made; it subsists in the property ever afterwards so long as the mortgage-money remains unpaid: it limits the interests of the mortgagor as they were at the time of the mortgage—*Gopal v. Parshotam*, 5 All. 121 (138). If an instrument is expressly stated to be a mortgage, and gives the power of realisation of the mortgage-money by sale of the mortgaged premises, it should be held to be a mortgage. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien or directs the realisation of money from a particular property *without reference to sale*, it creates a *charge*—*Gobinda v. Dwarka*, 35 Cal. 837 (844), 12 C.W.N. 849.

The words “cause the mortgaged property to be sold” imply that the mortgagee has no power to sell the property without the intervention of the Court—*Kishan Lal v. Ganga Ram*, 13 All. 28. A simple mortgage does not directly confer on the mortgagee the power of private sale; in order to make his security available, he must obtain an order of a Civil Court for sale—*Wahid-un-nissa v. Gobardhan*, 22 All. 453.

The right to cause the mortgaged property to be sold may be conferred by implication, not necessarily by express words—*Ponnuranga v. Thanda-varada*, 1915 M.W.N. 21, 26 I.C. 274; *Venkatarama v. Suppa Nandan*, 27 M.L.J. 58, 24 I.C. 24. Words of hypothecation and simple mortgage have always been understood to import the right of the mortgagee to bring the property to sale for satisfaction of his claim, and *no express* words conferring such right are insisted upon as necessary to create such right—*Kishan Lal v. Ganga Ram*, 13 All. 28; *Balasubramania v. Sivaguru*, 21 M.L.J. 562, 11 I.C. 629 (632); *Yeshvant v. Vithal*, 21 Bom. 267 (271). Such words, for instance, as *rehan* (mortgage) *arh* and *mushtaghraq* have been held to be of themselves sufficient to convey the right—*Gouhar v. Ajudhia*, 20 I.C. 870 (Oudh); *Kishan Lal v. Ganga Ram*, 13 All. 28; *Dalip Singh v. Bahadur Ram*, 34 All. 446. Security mortgages such as *nazar gahan* or *taran gahan* mortgages are mortgages proper, even though the right to bring the property to sale is not expressly given to the mortgagee; the power of compulsory sale to realise the debt in such a transaction is itself a right or interest in immovable property transferred to the creditor—*Datto Dudheswar v. Vithu*, 20 Bom. 408 (F.B.).

Where the mortgagor stipulated that if he failed to pay the interest in any year or any instalment of principal the mortgagee would be entitled to take possession of the property, *held* that the mortgagee had the right either to bring the property to sale or to sue for possession; his remedy was not limited to a suit for possession—*Lingam Krishna v. Sri Mirza*, 15 C.W.N. 441 (442, 443) (P.C.), 13 Bom.L.R. 447, 8 A.L.J. 594, 10 I.C. 72, 21 M.L.J. 1147; *Rajah Sethrucharla v. Maharaja of Jaypore*, 1916 M.W.N. 354, 34 I.C. 411 (412); *Lalta Prosad v. Hori Lal*, 16 O.C.

90, 19 I.C. 748. Whether his primary remedy is a suit for possession or a suit for sale depends upon the construction of the deed; see *Deputy Commissioner v. Rampal*, 11 Cal. 237 (243, 244) (P.C.).

MORTGAGE BY CONDITIONAL SALE:—*Vernacular names:*—In Bengal, *Katkobala*; in Orissa, *Katbandhaka*; in U. P. and C. P., *bye-bil-wafa*; in Madras, *Muddata Kriyam* or *Drishtabandhaka*; in Bombay, *Gahan Lahan*; in Malabar, *Pornathan*.

Regulations:—This form of mortgage was introduced by the Mahomedans whose religion did not allow the taking of interest on a loan. By resorting to this form of mortgage the lender got his principal and interest in the shape of an enhanced price of repayment, and at the same time his money as well as his conscience was safe. This form of mortgage, commonly known as *bye-bil-wafa*, was given a legal recognition in the Bengal Regulation I of 1798, which provided that in case of the lender refusing to receive the money on the day named the borrower was empowered to deposit the amount due on or before the stipulated date in the Court. But the borrower had to labour under this hardship, that if he failed to pay the money on the stipulated date, either to the lender or in Court, the property automatically passed to the mortgagee without any further action on his part or the intervention of the Court. The mortgagor had then no right of redemption and the transaction once closed could not be reopened. This hardship was removed by the Bengal Regulation XVII of 1806 under which the mortgagee had to make an application for foreclosure and to give notice to the mortgagor, and had to obtain an order of the District Judge foreclosing the mortgage, before he could obtain an absolute title to the property; if the property was not in his possession, he had to bring a suit for possession. On the other hand, the Regulation gave the mortgagor a right of redemption within one year from the time of the service of the above notice in the foreclosure proceedings instituted by the mortgagee.

These rules of procedure are no longer of any importance, since the present Act will now govern the procedure, even though the mortgage might have been created before the passing of this Act. See Note 11 under section 2.

337. Previous law—Transaction contained in two documents:—According to the definition given in this section, a mortgage by conditional sale is an ostensible sale on condition that upon repayment of the money being made on a certain date the buyer shall transfer the property to the seller. The question then arises, whether the condition in the sale-deed is expressed with sufficient clearness so as to convert the sale into a mortgage or whether it merely gives the vendor a right to repurchase. In England, where the drafting of documents is in the hands of trained and skilled men, it is easy to find out the true nature of the transaction; but in this country where documents are drawn up by patwaris and petition-writers in stereo-typed phraseology, the solution of the question becomes a matter of extreme difficulty. The line of division between a mortgage by conditional sale and a sale with provision for repurchase is a very fine one, and, as Dr. Ghose observes in his *Law of Mortgage* (5th Edn., p. 88), to a layman it seems to be a distinction without a difference.

Prior to the addition of the proviso to clause (c) of this section, a mortgage by conditional sale was usually made by *two documents*, one

being a sale-deed, and the other containing the condition of reconveyance; and the question frequently arose whether the second document operated to convert the sale into a mortgage so as to give the vendor the right of redemption such as a mortgagor enjoys, or it simply stipulated that the vendor would have a right of repurchase.

The following tests were applied for the determination of the question:—

(1) One important test was to consider whether the sale was *subject* to the agreement for reconveyance or *was independent* of it; that is, whether the two documents were part and parcel of the *same transaction* or were mutually *independent*. If the two were separate transactions altogether, the sale could not possibly be said to have been subject to any condition of repurchase—*Mathura v. Jagdeo*, 49 All. 405, A.I.R. 1927 All. 321 (326), 104 I.C. 504. Where two documents, one for sale and another for agreement of reconveyance, were executed on the same date, and the sale was expressed to be “*subject* to the terms of the deed of agreement executed by the vendee”, it was held that the sale-deed incorporated the deed of agreement and that the two deeds read together constituted a mortgage by conditional sale and were not separate transactions—*Wajid Ali v. Shafakat Husain*, 33 All. 122 (123); *Ram Charan v. Dharam Singh*, 46 All. 173 (174); *Md. Hamiduddin v. Fakir Chand*, 18 A.L.J. 478, 58 I.C. 717 (720).

(2) Another test was whether *possession* was delivered to the purchaser or whether the vendor retained some hold on the property. Where a document purposed to be a sale out and out, and under it the purchaser took *possession* of the property, and on the same day an *ekrarnama* was executed to the effect that if the purchase-money was repaid within four years, the purchaser would give up the property, *held* that the transaction was a sale and not a mortgage—*Mohammad Yusuff v. Jashodha*, 2 I.C. 930 (931). See also *Madhusudan v. Hridoymoni*, 6 C.W.N. 192 (194).

(3) If the document containing the agreement of reconveyance gave the vendor a power to get the property reconveyed to him *as of right*, on repayment of the purchase-money, the presumption arose that the covenant converted the sale into a mortgage. But if that document stipulated that the vendee, as a *matter of grace*, would cancel the sale on payment of the purchase-money within ten years, the transaction could not be construed as a mortgage—*Jhanda Sing v. Sheikh Wahiduddin*, 38 All. 570 (579) (P.C.); *Bhagwan Sahai v. Bhawgan Din*, 12 All. 387 (391) (P.C.).

(4) A stipulation regarding the payment of *interest* on repayment of the purchase-money was material as tending to show that the transaction was not a sale but a mortgage (though such a stipulation was not always a conclusive evidence)—*Ali Ahmed v. Rahamtulla*, 14 All. 195; *Bai Motivahu v. Mamu Bai*, 21 Bom. 709; *Maruti v. Balaji*, 2 Bom.L.R. 1058 (1068); *Madhu Sudan v. Rhidhaymoni*, 6 C.W.N. 192 (195); *Baldeo Prasad v. Chet Ram*, 1 O.L.J. 703, 26 I.C. 706; *Muhammad Hamiduddin v. Lala Fakirchand*, 58 I.C. 717 (718), 18 A.L.J. 478; *Gulzar Singh v. Sheo Nath*, 11 O.L.J. 275, 78 I.C. 547, A.I.R. 1925 Oudh 11.

(5) Another test to apply was whether the two documents were executed on the *same date*. If the two deeds were not executed on the same date but on *different* dates, and were also registered on different dates, *held* that it might be reasonably inferred that the parties intended that the

transactions should be kept *separate* and distinct and that the two deeds were not intended to be parts of the same transaction so as together to constitute a mortgage by conditional sale—*Jhanda Singh v. Wahiduddin*, 33 All. 585 (588); see also *Uthandi v. Ragavachari*, 29 Mad. 307. If they were executed on the *same date*, the Court would infer that the transaction was a mortgage—*Ram Charan v. Dharam Singh*, 46 All. 173; see also *Kastur Chand v. Jakhia*, 40 Bom. 74 (80); *Madhavrao v. Shebrao*, 39 Bom. 119; and *a fortiori*, where the two documents were executed on the *same date*, written by the *same scribe*, attested by the *same witnesses*, registered on the *same date*, and the parties were identified before the Registrar by the *same witnesses*—*Kirpal v. Sheoambar*, 28 A.L.J. 610, A.I.R. 1930 All. 283 (285), 126 I.C. 366. If the deeds were executed on different dates but registered on the *same day* the effect was the same, and they must be construed together as forming a single transaction in the nature of a mortgage by conditional sale; see *Palaniyappan v. Subbaraya*, 1914 M.W.N. 222, 22 I.C. 4 (6).

(6) Another test to apply was whether the *relation of debtor and creditor* subsisted between the parties. "The rule of law on this subject is one dictated by common sense, that *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase"—*per* Lord Cranworth in *Alderson v. White*, (1858) 2 DeG. & J. 97 (105). If there was nothing to indicate an intention that there should be a relationship of debtor and creditor or that the lands should be a security for the debt, or that there was any question of repayment of the debt, then the transaction could not be interpreted as a mortgage—*Maruthai v. Dasappa*, 31 M.L.J. 375; *Ganesa Mudaliar v. Gnanasikamani Mudaliar*, 47 M.L.J. 385; *Ma Hnin v. Osman*, 5 Bur.L.T. 99, 15 I.C. 423; *Maung Tha v. Maung Mya*, 3 Bur.L.T. 136, 8 I.C. 981 (982); *Md. Yusuff v. Jasodha*, 2 I.C. 930 (931); *Jhanda Singh v. Sheikh Wahiduddin*, 38 All. 570 (580) (P.C.). But if the apparent price was treated and regarded as a continuing *debt* between the parties, the transaction was a mortgage, and not a sale—*Kastur Chand v. Jakhia*, 40 Bom. 74 (82, 83), 31 I.C. 388. Thus, where the agreement for repurchase stipulated that whenever within 5 years the vendors paid the vendees the amount of the consideration money together with interest thereon (at a certain rate) but deducting therefrom the actual profits realised by the vendees from the property, the vendors would get the property reconveyed, *held* that the provision as to the accounting at the time of the demand for reconveyance showed clearly that the relation of debtor and creditor existed between the parties, and that the two documents taken together showed that the transaction was a mortgage by conditional sale—*Md. Hamiduddin v. Fakir Chand*, 18 A.L.J. 478, 57 I.C. 717 (719).

(7) The amount paid as consideration was an important test. Thus, two deeds were executed on the *same date*. The vendor sold the villages for a price which was an amount immediately required to prevent a sale under a decree; and the purchaser paid that amount without any inquiry as to the property, and the whole transaction (namely the sale and the agreement to resell) was not the result of any bargaining as to the value of the property sold or as to the price to be paid. The consideration for the sale was grossly inadequate, and a clause in one of the deeds indicated

that time was not of the essence of the contract for repurchase. *Held.* that the transaction was not a sale but a loan, i.e., a mortgage by conditional sale—*Narasingerji v. Parthasarathi*, 47 Mad. 729 (743, 744) (P.C.), 47 M.L.J. 809, 29 C.W.N. 246, 23 A.L.J. 161, 27 Bom.L.R. 4, 82 I.C. 993, A.I.R. 1924 P.C. 226. If the price paid was a fair and proper price for the land, that would be a good reason for presuming the transaction to be a sale. See *Modhusudan v. Hridaymoni*, 6 C.W.N. 192 (194).

(8) Where the parties in one document were not the same as the parties in the other document, the transaction could not be deemed a mortgage. Thus, where three vendors together sold some property to the purchaser, and some months afterwards the latter executed an agreement to resell in favour of *one* of the vendors, *held* that since the two transactions were not between the *same* parties, the latter agreement could not be used to modify the earlier transaction and to convert the sale into a mortgage—*Uthandi v. Raghavachari*, 29 Mad. 307 (308); *Ramakanta v. Kalijoy*, 11 I.C. 124 (125) (Cal.).

(9) If the sale deed expressly and unequivocally declared that the “sale is absolute and final, that the contracting parties have no right to cancel the sale and to demand restitution of the consideration-money and that the vendor has no right to any part of the property sold” the words must be construed in their literal meaning to constitute an out and out sale, and the contemporaneous covenant of repurchase would not convert it into a mortgage—*Ghulam Nabi v. Niazunnissa*, 33 All. 337; *Ram Din v. Rang Lal*, 17 All. 451 (453). An instrument designated and executed as a sale-deed should be so treated unless the contrary is manifest—*Ayyavayar v. Rahimansa*, 14 Mad. 170 (at p. 172).

(10) The best general test as to the nature of the transaction was “the existence or non-existence of a power in the original purchaser to recover the sum named as the price for such re-purchase; if there is no such power, there is no mortgage.” Dart on *Vendors and Purchasers*, 3rd Ed., p. 536; Sugden’s *Vendors and Purchasers*, 13th Ed., p. 166; Coote on *Mortgages*, 3rd Ed., pp. 14, 21; *Perry v. Meddowcroft*, 4 Beav. 197, 203; *Verner v. Winstanley*, 2 Sch. & Lef. 393; *Bell v. Carter*, 17 Beav. 11; *Cogden v. Battams*, 1 Jur. N.S. 791; *Williams v. Owen*, (1840) 5 My. & Cr. 303, 48 R.R. 322; *Alderson v. White*, 2 DeG. & J. 95 (97). Thus, if the amount agreed upon as the price of repurchase was the *same* as the consideration for the original sale, the deed was clearly a *mortgage* by conditional sale, and not a *sale* with agreement of repurchase—*Maung Po Gyi v. Hakim Ally*, 2 Rang. 113 (116), A.I.R. 1924 Rang. 235, 3 Bur. L.J. 44, 80 I.C. 759.

The whole thing has been thus summed up by Butler in his edition of *Coke on Littleton*: “If the money paid by the grantee was not a fair price for the absolute purchase of an estate conveyed to him; if he was not let into immediate possession of the estate; if instead of receiving the rents for his own benefit he accounted for them to the grantor and only retained the amount of interest; or if the expense of preparing the deed of conveyance was borne by the grantor; each of these circumstances has been considered by the Courts as tending to prove that the conveyance was intended to be merely pignorititious.”—Cited in Ghose’s *Law of Mortgage*, 5th Edn., p. 91.

In construing the documents, the main question for enquiry was the

intention of the parties, and this intention had to be gathered from the language of the documents themselves, the circumstances attending their execution and also from the conduct of the parties—*Jhanda Singh v. Sheikh Wahiduddin*, 33 All. 585 (602); on appeal, 38 All. 570 (574) (P.C.); *Ramdas v. Brindaban*, 1931 A.L.J. 571, A.I.R. 1931 All. 113 (120, 121, 123). The case had to be decided upon a consideration of the documents themselves with such extrinsic evidence of the circumstances as might show in what manner the language of the documents was related to existing facts—*Balkishen v. Legge*, 22 All. 149 (P.C.). If the documents purported to connote an absolute sale, it lay on the party who contended that it was a mortgage to prove his contention—*Ramdas v. Brindaban*, *supra*.

338. Present law—Effect of proviso:—The proviso, newly added by the Amendment Act of 1929, lays down that “no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.”

The *Special Committee* observes:—

“Section 58 (c) contains the definition of a mortgage by conditional sale. It is with the greatest difficulty in many cases that such mortgages can be distinguished from sales with a condition for repurchase. As clause (c) of section 58 indicates, the real point of difference between the two kinds of transaction is that, in the case of a mortgage by conditional sale, the sale is only ostensible, whereas in the case of an out and out sale it is real. The ostensible or real nature of the transaction can, however, be only determined by finding out the intention of the parties. In order to escape the liability of accounting for the profits of the property and other liabilities imposed on a mortgagee, and also to escape the provisions of some of the local laws enacted for the benefit of agriculturists, creditors resort to the mode of having a mortgage which is in form an out and out sale. Since the decision of the Privy Council in *Balkishen Das v. Legge*, (I.L.R. 22 All. 149), it has been a well-settled rule that it is not open to Courts to allow any extraneous evidence in order to find out the intention of the parties. Such intention must, therefore, be gathered from the document itself which purports to effect the transaction. These transactions have given rise to a great deal of litigation and Courts are compelled to enumerate and consider all the various criteria which have been laid down for the purpose of determining whether a transaction is a mortgage or an out and out sale. In order to avoid the difficulties indicated above, we think it is desirable to lay down a statutory test by which the intention is to be gathered. We, therefore, propose that no transaction should be deemed to be a mortgage by conditional sale unless the condition is embodied in the document which operates or purports to effect the sale.”

Two things are laid down in the proviso:—(1) *first*, the mortgage by conditional sale is to be effected by *one* document; and thus the various criteria for determining whether the two documents operate to create a mortgage will no longer be necessary. But the mere fact that the condition of repurchase is contained in the same document which effects the sale does not render the transaction a mortgage by conditional sale, unless there is a relationship of debtor and creditor between the parties—*Kuppa Krishna v. Mhasti*, 33 Bom.L.R. 633, A.I.R. 1931 Bom. 371 (373), 134 I.C. 337. (2) *Secondly*, the condition which converts the sale into a mortgage must be embodied in the document, so that no extrinsic evidence will

be admissible to prove that a document which purports to be an absolute sale is in reality a mortgage.

In two Calcutta cases, evidence was admitted of the acts and conduct of the parties to show that the document which purported to be a sale was in reality a mortgage by conditional sale—*Khankar v. Ali Hafez*, 28 Cal. 256 (258); *Mahomed Ali v. Nazar Ali*, 28 Cal. 289 (291). These cases are no longer good law.

It has been laid down by the Privy Council that oral evidence of intention is not admissible for the purpose of construing the deed or ascertaining the intention of the parties, nor can evidence of oral agreement be admitted for the purpose of contradicting, varying or adding to the terms of the instrument—*Balkishen Das v. Legge*, 22 All. 149 (P.C.).

339. Incidents of mortgage by conditional sale:—The incidents of a mortgage by conditional sale under the present Act are the same as those under the Bengal Reg. XVII of 1806. On the one hand, the mortgagee has the right of foreclosure; on the other, the mortgagor is entitled to redeem. Under Reg. XVII of 1806, in a mortgage by way of conditional sale, the mortgagee could not enter into possession, even after the lapse of the time fixed by the agreement, without taking legal steps for foreclosure. If he entered without doing so, he was a mere trespasser and could be ejected by the mortgagor—*Hub Ali v. Wazirunnissa*, 28 All. 496 (P.C.). But in Madras, C. P. and other provinces where the Bengal Regulation was not in force, the mortgagee had not to bring a suit for foreclosure, but on the expiry of the stipulated period of repayment the mortgage executed itself and the transaction was closed and became one of absolute sale, without the intervention of the Court. See *Thambusamy v. Hossein*, 1 Mad. 1 (P.C.). But after the passing of the Transfer of Property Act, the law is uniform in all provinces, and now under a mortgage by conditional sale, the ownership will not be vested in the mortgagee in default of payment on due date until there is a decree absolute for foreclosure—*Raghunath v. Sheolal*, 13 N.L.R. 69, 39 I.C. 849; *Afsar Sheik v. Sauraba Sundari*, 25 C.L.J. 560, 40 I.C. 371. The essential characteristic of a mortgage by conditional sale is that on the breach of the condition of repayment within the stipulated period, the contract executes itself and the transaction is closed and becomes one of absolute sale, *to be enforced by foreclosure*—*Sheoram v. Babu Singh*, 48 All. 302, 24 A.L.J. 295, A.I.R. 1926 All. 493, 94 I.C. 849.

The words “a certain date” occurring in the first sub-clause of this clause should be read as confined only to that sub-clause, and should not be imported into the other two sub-clauses. That is, the words “on such payment being made” in the other two sub-clauses should not be interpreted as “on payment being made on a certain date.” The “certain date” refers only to the ‘default of payment’ mentioned in the first sub-clause, and not to the ‘payment’ referred to in the two clauses following. A certain date of payment is not necessary where the transaction is a *mortgage* by conditional sale, but only where the transaction is an out and out *sale* with an agreement to resell; because, it is conceivable that between the date of the sale and the time when the seller may elect to exercise his option and demand reconveyance of the property on payment of the money, considerable time might have elapsed, and the price of the property might have doubled or trebled, and in such a case it would be strange to suppose that without fixing any certain date of payment and without any regard what-

ever to the possible and probable changes in the price of the property the parties would agree to grant a resale whenever the other party might wish to demand the same. But in a *mortgage* by conditional sale, no regard is had to the change in the price of the property, and consequently no date is fixed for payment—*Padmanabha v. Sitarama*, 54 M.L.J. 96, 106 I.C. 158, A.I.R. 1928 Mad. 28 (31). But in *Kinuram v. Nitye*, 11 C.W.N. 400, and *Haji Mahomed v. Asraf Ali*, 25 I.C. 93 (Cal.), it has been held that a certain date of *payment* is essential in a mortgage by conditional sale. In the last mentioned case it has been further held that the words “on a certain date” mean “on or before a certain date,” so that the mortgagor may make payment on an earlier date. The Oudh Chief Court also holds that a ‘certain date’ of payment distinguishes a mortgage by conditional sale from an out and out sale. That date is generally a date more appropriate to the redemption of a mortgage than to a reconveyance by way of sale—*Mahabir v. Bharat*, 11 O.L.J. 312, A.I.R. 1924 Oudh 417 (418).

A mortgage by conditional sale is essentially a mortgage, and therefore it is necessary that the *relation of debtor and creditor* should exist between the parties. Thus, a deed of sale ran thus: “I have sold this land to you for Rs. 600, and have given the land into your possession. If at any time I require back the land I will pay you the aforesaid Rs. 600 and any money you may have spent for bringing the land into good condition, and purchase back the land.” *Held* that the document was not a mortgage, because no *debt* existed between the parties. It was a sale with an option of repurchase—*Gurunath v. Yamanava*, 35 Bom. 258 (260).

In this class of mortgage, the mortgagor *ostensibly* sells the mortgaged property. The word “ostensible” means that the object bears the appearance of a sale, but is *not really a sale*.” If the parties have *intended it to be a sale*, then of course it cannot be a mortgage. The test is the intention of the parties—*Mumtaz v. Lachhmi*, A.I.R. 1929 All. 174 (178), 116 I.C. 807. A mortgage by conditional sale is an *ostensible sale*; that is, it is executed in the form of a sale (with a condition attached to it). But where the mortgagor puts the mortgagee in possession of the mortgaged property and the deed provides that the mortgagee shall enjoy the property, paying the revenue to Government, that the principal and interest shall be repaid on a certain date, and that in default the mortgagor shall give up the lands as sold to the mortgagee and *shall execute a proper sale-deed*, the transaction is not a mortgage by conditional sale, but is a combination of a simple mortgage and an usufructuary mortgage—*Kandula Venkiah v. Donga Pallaya*, 43 Mad. 589 (599) (F.B.). In this form of mortgage, there must be an ostensible sale to begin with, and if the document neither ostensibly nor otherwise purports to be a sale-deed, it does not satisfy the requirements of a mortgage by conditional sale—*Ibid* (at p. 603). Where a deed of *sale* of land contained a clause by which the purchaser undertook to resell the land to the vendor at his request within three years for the same amount as the consideration of the sale, *held* that the deed was clearly a mortgage by conditional sale—*Maung Pe Gyi v. Hakim Ally*, 2 Rang. 113 (116), A.I.R. 1924 Rang. 235, 80 I.C. 759, 2 Bur.L.J. 44.

This section provides that where a mortgagor has ostensibly sold his property on condition that on payment of the mortgage-money the buyer shall re-transfer the property to the seller, the transaction is a mortgage

by conditional sale. And this would be so even though the language of the document itself does not use the word 'mortgagor' 'mortgaged property' or 'mortgage-money.' The conveyance may ostensibly be a deed of sale, with all the phraseology employed in drafting sale-deeds, but if that sale is in reality subject to a condition of a retransfer on payment of the amount, the law regards it as a mortgage by conditional sale. The presence in the deed of such words as imply a mortgage is not absolutely necessary. The cardinal point is whether the sale is subject to a condition of repurchase on payment—*Mathura v. Jagdeo*, 49 All. 405, 104 I.C. 504, A.I.R. 1927 All. 321 (326); *Lalta Prasad v. Jagdish*, 48 All. 787, 24 A.L.J. 1057, A.I.R. 1927 All. 137 (143), 98 I.C. 961.

The "mortgage-money" in this clause means the purchase price, along with interest or without it, and after deduction or addition of any further sum, according as this Act prescribes such interest, addition or deduction—*Lalta Prasad v. Jagdish*, *supra*.

Even though the transaction is contained in one document, it is not by itself sufficiently conclusive that the transaction is a mortgage. A transaction is not intended to be a mortgage when it is found that there is nothing to show that the relation of debtor and creditor exists, that there is nothing about interest or its equivalent, that the price is a very fair one for a sale, and that a very long period (five times the period contemplated in the deed) has been allowed to elapse before the party took action. It is immaterial that prior to the transaction the relation of debtor and creditor had existed between the parties. The intention of the parties is material for deciding whether the transaction is a sale or a mortgage—*Mumtaz Begum v. Lachhmi*, A.I.R. 1929 All. 174 (178, 179, 180), 116 I.C. 807. A mere agreement to reconvey does not convert the sale into a mortgage, irrespective of the intention of the parties—*Muthuvelu v. Vythilinga*, 42 Mad. 407 (418) (F.B.).

340. Instances of mortgage by conditional sale:—Where in a deed it was stipulated that the principal amount with interest should be paid within five years and that "should this amount be not paid within the time above specified and the whole or a portion thereof remain unpaid, this mortgage-deed will be considered an absolute deed of sale free from all disputes, and the mortgagee will be entitled to possession of the village," *held* that the deed was one of mortgage by conditional sale—*Janki v. Jai Dei*, 9 O.C. 147. A document described as a "conditional deed of sale" enumerated the amounts borrowed from the mortgagee and then ran thus: "I shall pay the said principal and interest on 26th June, 1879 and take back this bond. If I fail to pay accordingly on the due date, my land mentioned in the patta I shall give up to you treating the principal and interest hereof as sale proceeds." *Held* that this was a deed of mortgage by conditional sale—*Kola Venkatanarayana v. Vuppala Ratnam*, 29 Mad. 531 (533). Where a person executed a document by which he purported to sell the property in consideration of a loan due by the executant, but it was agreed that if the executant paid the amount within 3 years, the property would be "released," *held* that the transaction amounted to a mortgage by conditional sale and not an out and out sale—*Mumtaz Begam v. Lachhmi*, 1930 A.L.J. 1435, A.I.R. 1931 All. 196 (197), 130 I.C. 15. A document which purported on the face of it to be a deed of sale of a share in a certain village contained the following provision:—"If within six years in the month of Jeth, I, the executant, pay the consideration

Rs. 3,000, and the arrears of rent which may then be due against the tenants, the vendee shall reconvey the vended property to me, otherwise the property will not be reconveyed." Further in the body of the document the consideration for the transfer was described as mortgage-money. *Held* that the transaction was a mortgage by conditional sale and not an out and out sale—*Mohindra v. Maharaj Singh*, 45 All. 72 (75), 20 A.L.J. 810, A.I.R. 1923 All. 48. A document was framed and worded exactly in the same manner as a mortgage by conditional sale in English precedents of conveyancing; the consideration was stated to be the same amount that was specified as the sale price, and there was a direction that after paying certain creditors of the executant the transferee should obtain the debt-bonds with an endorsement of discharge on them, and that he should keep them with him as vouchers in support of the sale-deed. *Held* that the document was not one of outright sale but a mortgage by conditional sale; for if it were an outright sale, it would be difficult to understand why the transferor should have required the transferee to obtain those bonds and keep them in support of the deed—*Padmanabha v. Sitarama*, 54 M.L.J. 96, A.I.R. 1928 Mad. 28 (30).

The effect of a *lahan gahan* mortgage is the same as that of a mortgage by conditional sale; and mortgages in form similar to that of *lahan gahan* (e.g., *katkobala* or *bye-bil-wafa*) stand on the same footing as mortgages by conditional sale—*Mahomed Haji v. Ramappa*, 25 N.L.R. 187 (F.B.), A.I.R. 1929 Nag. 254 (255), 119 I.C. 684.

USUFRUCTUARY MORTGAGE:—

Vernacular names:—In Bengal, *khai khalasi* or *bhoga bandhaki khat*; in Madras, *diggu bhogyam*, *swadhin adamanam*.

342. Amendment:—The words "*or expressly or by implication binds himself to deliver possession*" have been newly inserted in this clause. In an early Bombay case also it has been held that it is not necessary for a usufructuary mortgage that possession should be actually delivered to the mortgagee. If a *right* of entry is given to the creditor, there is a transfer of an interest in immovable property just as much as if possession were actually delivered. Therefore where a deed contains the words "we have this day put the said land and house into your possession," but the mortgagee has not actually taken possession, the mortgage is still a usufructuary mortgage—*Motiram v. Vitai*, 13 Bom. 90 (100). But in a Madras Full Bench case it was held that a mortgagee did not become a usufructuary mortgagee under sec. 58 (d) until the mortgagor had given him possession of the mortgaged property—*Subbamma v. Narayya*, 41 Mad. 259 (263) (F.B.). The Full Bench further held that since the mortgagee had not been given possession of the property, he became entitled to sue for the mortgage-money under sec. 68; in other words, the mortgage-money "became payable" to him; and as he was not a usufructuary mortgagee, for the reasons stated above, the proviso (a) of sec. 67 did not apply to him, and he was entitled to sue for foreclosure or for sale under sec. 67, which entitles a mortgagor to do so at any time after the mortgage-money has become "payable." There was an anomaly in this decision which the Full Bench failed to notice, *viz.*, that the mortgagee was treated as a usufructuary mortgagee for the purpose of sec. 68 (which applies to usufructuary mortgagees) and as not a usufructuary mortgagee for the purpose of applying proviso (a) of sec. 67. The *Special Committee* remarks:—

"In a suit on a usufructuary mortgage where possession had not been delivered, the Madras High Court held that the mortgage-money had become due under section 68 of the Transfer of Property Act and that under section 67 the mortgagee was entitled to a decree for sale. They held that the provision of the latter section (*viz.*, that the usufructuary mortgagee has no right to sell) did not apply on the ground that delivery not having been effected, the transaction did not amount to a usufructuary mortgage (I.L.R. 41 Mad. 259). It seems to us that the High Court in that case omitted to notice that the mortgagee could only sue for the mortgage-money under section 68 on the basis of the transaction being a usufructuary mortgage and on no other, and that the same transaction could not be treated as a usufructuary mortgage for the purpose of attracting the provisions of section 68 and as not being a usufructuary mortgage for the purpose of applying section 67. The remedy of a usufructuary mortgagee to whom possession is not delivered is to sue for possession, and the mere fact that possession is not delivered cannot alter the character of the transaction (7 N.W.P. 56; 7 B.L.R. 14; I.L.R. 10 Cal. 68; 1 All. 325, 4 I.A. 15; 31 All. 318). We think it necessary to amend the section so as to avoid the anomalous result arrived at in the Madras case quoted above. We accordingly propose that after the words 'where the mortgagee delivers possession' the words '*or expressly or by implication binds himself to deliver possession*' should be inserted."

The effect of this amendment is that a usufructuary mortgagee is none the less so even if possession is not delivered to him; it is sufficient if he is *entitled to possession* under the terms of the deed. This amendment overrules the above Full Bench decision.

343. Incidents of usufructuary mortgage:—Unless there is a transfer of an interest in immoveable property for the purpose of securing payment of money advanced, there can be no usufructuary mortgage. Where there was an arrangement between the plaintiff and the defendant under which the latter borrowed a sum of money from the plaintiff and passed a simple money-bond in his favour and executed a lease subletting the land (occupancy-holding) to the plaintiff for 5 years, the understanding being that the interest payable on the sum advanced should be set off against the rent payable under the sub-lease, *held* that the transaction did not amount to an usufructuary mortgage of an occupancy-holding. The plaintiff is liable to be evicted from the land at the end of five years and cannot insist on retaining the land till the money is paid (because under sec. 25, Agra Tenancy Act, an occupancy tenant can sublet his holding only for 5 years and no more). A usufructuary mortgagee, on the other hand, is entitled to continue in possession till payment of his dues in full—*Chotey Lal v. Mohanian*, 1930 A.L.J. 332, A.I.R. 1930 All. 375 (376), 127 I.C. 425.

The word "deliver" does not necessarily mean "deliver *immediately*," and where the mortgagor is not in possession, it is sufficient if he gives the right to possession. Therefore, where under the terms of a mortgage-deed, the possession is to be delivered to the mortgagee subsequent to the date of the mortgage, the transaction is still a usufructuary mortgage—*Bisheshar v. Debi Baksh*, 16 O.C. 56, 17 I.C. 329 (332). Where the mortgagor covenanted to put the mortgagee in possession of certain village on a *subsequent* date, and to pay interest at 24 per cent. until possession was delivered, *held* that the mortgage was a usufructuary mort-

gage—*Partab Bahadur v. Gajadhar*, 24 All. 521, (530, 531) (P.C.). Further, in order to render a mortgage usufructuary under this clause, it is not necessary that there should be an express stipulation to appropriate the profits in lieu of interest. If, by the terms of the instrument the profits are not to be appropriated in satisfaction of the principal, the only inference must be that they are to be appropriated in lieu of interest—*Kandula Venkiah v. Donga Pallaya*, 43 Mad. 589 (600) (F.B.), 57 I.C. 274.

Where there was a covenant that the mortgagor would pay interest every year but that *if he failed to pay interest, the mortgagee could take possession*, and would appropriate the usufruct towards interest and pay the balance (if any) to the mortgagor, *held* that the transaction was a simple mortgage, and not a usufructuary mortgage, because no present possession was delivered, but possession was merely contingent on the failure to pay interest—*Yeshvant v. Vithal*, 21 Bom. 267 (272). For similar cases see Note 335 *ante*. It seems that such a mortgage will now be treated as an anomalous mortgage. See Note 335.

Since a usufructuary mortgagee is entitled to remain in possession "until payment of the mortgage-money," *no time can be fixed* during which the mortgage is to subsist; and if the parties stipulate that the mortgage is for a definite period (*e.g.* 4 years), it is no longer a usufructuary mortgage but becomes an anomalous mortgage—*Hikmatulla v. Imam Ali*, 12 All. 203 (205); *Chhathi v. Bindeshwari*, 8 Pat. 16, A.I.R. 1929 Pat. 605 (608), 120 I.C. 32, 11 P.L.T. 68.

The definition contained in this clause is a true definition of a usufructuary mortgage, and it does not fix any time or contain any personal covenant or agreement of payment; as the mortgage is for an indefinite period and does not fix any time for payment, it is open to the mortgagor to pay off the mortgage or not as he pleases, and as there is no personal covenant for payment by the mortgagor, the mortgagee cannot compel payment of the mortgage amount—*Chathu v. Kunjan*, 12 Mad. 109 (110). In a pure usufructuary mortgage, any personal liability on the part of the mortgagor is excluded. Such personal liability may, however, arise under the circumstances mentioned in sec. 68—*Ram Narayan v. Adhindra*, 44 Cal. 388 (400, 401) (P.C.); *Chathu v. Kunjan*, *supra*.

If the deed itself contains a personal covenant, the mortgage becomes a combination of a simple and a usufructuary mortgage.

The words "or any part of such rents and profits" have been newly added. "The definition of a usufructuary mortgage is not exhaustive. It does not provide for a case where the mortgagee is entitled to appropriate a portion only of the income of the property mortgaged in payment of the mortgage-money. We propose to alter the section accordingly."—*Report of the Special Committee*.

Lekha mukhi mortgage:—A *lekha mukhi* mortgage in the Punjab is a usufructuary mortgage by which the land is made over to the mortgagee who has to look to its produce for the payment of the mortgage-debt, the mortgagor undertaking no personal liability and the mortgagee not being entitled to sue for the debt—*Gahi Mal v. Shera*, 90 P.R. 1881; *Khandu Lal v. Fazal*, 51 I.C. 956 (957); *Rattigan's Customary Law*, 8th Edn., p. 151. See also *Ghose's Law of Mortgage*, 5th Edn., p. 109.

344. Zur-i-peshgi leases:—A *Zur-i-peshgi* lease (*i.e.* a lease for a consideration) is a lease granted on a sum of money being advanced; it

bears a close affinity to a usufructuary mortgage from which it is not easily distinguishable, and so in a large number of earlier cases it was invariably held to be a mortgage. The difference between a Zuripeshgi lease and a usufructuary mortgage lies in this, that under a usufructuary mortgage the mortgagee is authorised to retain possession until the mortgage-money is satisfied, but in a Zuripeshgi lease the mortgagee is to retain possession for a *definite period only*—*Chhathi, v. Bindeshwari*, 8 Pat. 16, A.I.R. 1929 Pat. 605 (608), 120 I.C. 32, 11 P.L.T. 68. A *Zur-i-peshgi* lease is a lease granted by the debtor to his creditor on a fixed rent reserved by the lease, which is generally a little over the amount of interest agreed to be paid by the debtor. The surplus, if any, is payable to the debtor or may be applied towards reduction of the principal. These leases were devised to evade the laws against usury which limited the maximum rate of interest to be 12 per cent. per annum. The criterion for distinguishing such a lease from a mortgage is whether a right of redemption is expressly or impliedly reserved to the lessor, in which case the transaction is to be deemed a mortgage—*Basant Lal v. Tapeswari*, 3 All. 1; *Gopal v. Desai*, 6 Bom. 674. Another test for distinguishing the two is whether the lease was by way of security for the payment of any money; that is to say, the question depends upon whether the object of the instrument was to create a relationship of debtor and creditor or of simple landlord and tenant. If there is no relationship of debtor and creditor, there can be no mortgage—*Abdulbhai v. Kashi*, 11 Bom. 462; *Sheikh Muhammad Hanif v. Moorav Mahton*, 4 P.L.W. 146, 44 I.C. 153. Another test is to find out whether there is a secured debt and a right of redemption. In a *Zur-i-peshgi* lease properly so called, there is an advance to the lessor in consideration of which the lessee is given possession of the land for a term during which he recoups himself for the sum advanced and interest out of the profits of the land of which he is put in possession. There is no question of redemption upon paying off an advance. The lease terminates at the expiration of the term and the lessor may thereafter re-enter. The transaction is really one in which rent is paid in a lump sum in advance instead of by instalments during the term. Where, however, the interest created in the lessee continues after the expiration of the term until the advance (which is essentially a loan and not an advance of rent) is paid, the transaction has the essential characteristics of a mortgage—*Maharaja Kesho Prasad v. Chandrika Prasad*, 2 Pat. 217, 3 P.L.T. 797, 69 I.C. 394, A.I.R. 1923 Pat. 122. Where a person executed an instrument purporting to be a mortgage of certain villages with possession for a period of 14 years, by which it was provided that on the expiration of the term the mortgagor "shall come into possession of the mortgaged villages without settlement of accounts, that on the expiration of the term the mortgagee shall have no power whatever in respect of the said estate, and that after the expiration of the term this mortgage-deed shall be returned to the mortgagor without his accounting for (paying) the mortgage-money secured under this document" *held* that the instrument was not a mortgage in any proper sense of the word. It was not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption express or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made out of past and present advances—*Nidha Sah v. Murlidhar*, 25 All. 115 (P.C.). Such deeds should not be held to be mortgages merely because the parties used such

nomenclature, although the fact of the parties having designated the same in such a way shews that they believed themselves to be clothed with all the rights and remedies incidental thereto—*Tukaram v. Ramchand*, 26 Bom. 252 (258) (F.B.). A document styled a lease, under which, in consideration of money advanced, the claimant under it was only to enjoy certain specified lands for a certain number of years, but which contained nothing as to repayment of the borrowed amount, nor provided for payment of any rent as such, was not a lease, but a usufructuary mortgage, under which the rents and profits had been estimated to be sufficient to satisfy both principal and interest, so that no subsequent accounting might become necessary on either side—*Reference under Stamp Act*, 21 Mad. 358 (F.B.); *Reference under Stamp Act*, 7 Mad. 203. So also, a deed purporting to be a mortgage-deed with possession regarding land provided that in consideration of a debt of Rs. 240 due by the plaintiff (an agriculturist) to the defendant, the latter was to take possession of certain lands for ten years and appropriate the income thereof in liquidation of the debt, and that after the expiry of the said period the right to the land was to cease. The mortgagor having sued to redeem before the expiration of the ten years, it was held that the transaction amounted to an anomalous mortgage and not a lease, and that the mortgagor was entitled to redeem—*Tukaram v. Ramchand*, 26 Bom. 252.

ENGLISH MORTGAGE:

345. Incidents:—The three essentials of an English mortgage as defined in this section are (i) that the mortgagor should bind himself to repay the mortgage-money on a certain day; (ii) that the mortgaged property should be transferred absolutely to the mortgagee; and (iii) that such absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage-money on the day on which the mortgagor bound himself to repay the same. An English mortgage closely resembles an *absolute sale* with a condition of repurchase—*Narayana v. Venkataramana*, 25 Mad. 220 (235). In this case it has been observed that it is the characteristic feature of an English mortgage that the operative words should be the same as in an *absolute conveyance*, and consequently, the transfer should be by conveyance, assignment, demise or otherwise, according to the nature of the property; and therefore where the deed of mortgage in case of a freehold estate contained the words “the mortgagors do hereby mortgage and assign to the mortgagee the coffee estate described in the schedule hereto annexed,” etc., it was held that the word “mortgage” was inappropriate in the deed of English mortgage, and precluded the possibility of holding that the transfer was intended to be absolute, but that as the word “assign” was used, it might be said that the requisite of an English mortgage was fulfilled—*Narayana v. Venkataramana*, 25 Mad. 220 (235). This case was decided according to the practice prevailing in England. But, as has been observed in a recent Calcutta case, the law and practice obtaining in England ought not to be applied in interpreting an English mortgage executed in India. The provisions of the Transfer of Property Act must be regarded first before resorting to English practice. According to this Act, the definition of an English mortgage as given in sec. 58 (c) must be read subject to the definition given in clause (a) of the section, and consequently an English mortgage can hardly be regarded as the transfer of the *entire* interest of the mortgagor to the mortgagee.

Some estate is left in the mortgagor and only an interest thereon is transferred to the mortgagee—*Fala Krista v. Jagannath*, 59 Cal. 1314, 36 C.W.N. 709 (720), A.I.R. 1932 Cal. 775, 140 I.C. 788.

An English mortgage is rarely executed in the mofussil, and when executed, is treated as a mortgage by conditional sale, from which it has very little distinction (the only difference being that in the former there is a personal covenant to repay the money, which is absent in the latter). Where the mortgaged property is situated in the mofussil, and one of the parties is a Hindu, a mortgage though styled as an English mortgage does not transfer an absolute interest in favour of the mortgagee—*Ansur Subba Naidu v. Secretary of State*, 1917 M.W.N. 794, 41 I.C. 770; *Shurnomoyee v. Srinath*, 12 Cal. 614; *Pitchey Meera Rowther v. Pathumakutty*, 8 L.B.R. 413, 34 I.C. 24; but the mortgagor remains owner subject to the mortgage, and can exercise the ordinary rights of an owner in possession—8 L.B.R. 413.

According to the strict provisions of an English mortgage under the English law, the mortgagor is not entitled to remain in possession; but if he remains, as he usually does, it is only by sufferance, and he is liable to ejectment at any time without notice and without being entitled to reap what he has sown or to the standing crops. But if there be a clause in the instrument allowing the mortgagor to remain in possession for a fixed time, he cannot be ejected out of the covenant—*Moss v. Gallimore*, 1 Sm. L.C. (9th Ed.), 613. Under the Indian law, though the mortgage does not contain in so many words a covenant for possession, a right of entry on the part of the mortgagee may be implied from the terms of the deed. Even though the mortgagee enters into possession of the property by reason of a purchase at an execution sale under a decree which subsequently turns out to be invalid, he cannot be ousted from possession either by the mortgagor or by a person claiming under him, without the mortgage being redeemed—*Rukmini Kanta v. Baldeo*, 28 C.W.N. 920, 81 I.C. 1025, A.I.R. 1925 Cal. 77.

EQUITABLE MORTGAGE:—See the new clause (f). The provision for equitable mortgage was previously contained in the third para of sec. 59 which ran as follows:—

“Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab and in any other town which the Governor-General in Council may, by notification in the *Gazette of India*, specify in this behalf, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.”

No amendment has been made; the language is practically the same, except that the mortgage has now been specifically described as a “mortgage by deposit of title-deeds.”

The object of the Legislature in providing for this kind of mortgage is to give facility to the mercantile community, in cases where it may be necessary to raise money on a sudden before an opportunity can be afforded of investigating the title deeds and preparing the mortgage document.

An equitable mortgage by deposit of title-deeds is recognised and enforceable by law in the Punjab, although this Act does not apply to

that province—*Ram Mohan v. Bharat National Bank*, 3 Lah.L.J. 373. See also *Mrs. Stewart v. Bank of Upper India*, 31 P.R. 1916, 34 I.C. 937.

By a Government Notification, this provision has been extended to the Civil and Military Station of Bangalore; and a mortgage by deposit of title-deeds can be effected in that town. See *Papiah Naidu v. Naganatha Sethupathi*, 61 M.L.J. 408 (P.C.), 35 C.W.N. 1061 (1064), A.I.R. 1931 P.C. 239, 134 I.C. 328.

346. Incidents of equitable mortgage:—An equitable mortgage is valid only if made within the towns specified in this clause. If executed outside those towns it is invalid and gives no right to the mortgagee to proceed against the properties comprised in the mortgage—*Darbari v. Khetra*, 8 P.L.T. 85, A.I.R. 1927 Pat. 41 (42); *Konchadi v. Siva Rao*, 28 Mad. 54. But the property mortgaged may be situate outside those towns. See below.

Three things are required for an equitable mortgage: (1) A debt; (2) deposit of title-deeds; and (3) an intention that the transfer should be security for the former—*Behram v. Sorabji*, 38 Bom. 372, 23 I.C. 140.

(1) **Debt:**—An equitable mortgage may cover an existing as well as a *future debt*; that is, it may be created not only to secure a contemporaneous advance, but it can be extended to cover future advances as well—*Himalayan Bank v. Quarry*, 17 All. 252. An equitable mortgage is created when title-deeds are deposited under an oral agreement to cover present and future advances. As each advance is made, it becomes a charge upon the land comprised in the title-deeds, from the force of the prior oral agreement that it shall be so—*Jaitha v. Haji Abdul*, 10 Bom. 634 (644).

(2) **Deposit of title-deeds:**—To create a mortgage by deposit of title-deeds it is not necessary that the *property* to which they relate should be situate within one of the towns mentioned in this clause—*Valliappa v. Ko Tha Hnyin*, 4 Bur.L.T. 169, 11 I.C. 721; *Imperial Bank of India v. U. Rai Gyaw*, 51 Cal. 86 (100) (P.C.). An equitable mortgage can be created in the Presidency towns by the deposit of title-deeds of *property lying outside* those towns. Had it been the intention of the Legislature that transactions of the above description should only affect immoveable property situate within the narrow circle of the Presidency Towns, such intention would have been clearly expressed—*Madho Das v. Ram Kishen*, 14 All. 238; *Manekji v. Rustonji*, 14 Bom. 269; *Srinath v. Godadhur*, 24 Cal. 348; *Behram v. Sorabji*, 38 Bom. 372, 23 I.C. 140 (141) (*per Macleod, J.*).

Even it is immaterial whether the property is situate inside or outside British India. An equitable mortgage may be created by deposit of title-deeds of property situate in a Native State (*e.g.*, Baroda)—*Central Bank of India v. Nusserwanji*, 34 Bom.L.R. 1384, A.I.R. 1932 Bom. 642.

But the *delivery of the title-deeds* must take place within the towns mentioned in this clause—*Surajmull v. Gopeeram*, 36 C.W.N. 1028, A.I.R. 1932 Cal. 823.

Where the defendants had already executed a mortgage in favour of the plaintiff and handed him the title-deeds of the property, and subsequently the plaintiff advanced a further sum to the defendants, who agreed that the title-deeds should be retained by the plaintiff as security for the re-payment of the further advances, it was held that the plaintiff

was entitled to be declared an equitable mortgagee in respect of such further advances—*Dhirendra v. Kumud*, 25 Cal. 611; *Ex parte Kensington*, 2 V. & B. 83. In such cases it may be assumed that the parties agreed to treat the title-deeds as having been handed back to the mortgagor and rehanded to the mortgagee. Such an agreement was a constructive delivery of the title-deeds to the creditor as security for the further advances—*V. M. R. V. Chettyar Firm v. Asha Bibi*, A.I.R. 1929 Rang. 107 (108), 118 I.C. 407; *Cowasji v. Tyabji*, 23 S.L.R. 97, A.I.R. 1928 Sind 179 (186), 112 I.C. 722.

In an equitable mortgage it is not necessary that *all* the title-deeds should be deposited. An equitable mortgage may be valid if only some or one of the material documents of title to the property have been deposited, although a complete title be not thereby shown as to the depositor's interest in the estate—*Roberts v. Croft*, 24 Beav. 223; *Ex parte Wetherell*, 11 Ves. 398. Thus, for the purpose of creating an equitable mortgage of a share in an indigo concern it is quite sufficient to deposit the title-deeds under which that share was acquired—*Twoomey v. Bhupendra*, 7 Pat. 520, 111 I.C. 57, A.I.R. 1928 Pat. 304 (310); *Bhupendra v. Wajihunnessa*, 2 P.L.J. 293 (301), 39 I.C. 564. The documents must necessarily be documents showing the mortgagor's title; but that does not mean that they should never be held sufficient unless they actually connect the mortgagor with some predecessor of his whose title the documents show. On the other hand, if they purport to show the mortgagor's title in the property, it is not necessary that they should connect the mortgagor with some predecessor of his who had acquired the title originally—*Surendra v. Mohendra*, 59 Cal. 781, 36 C.W.N. 420, A.I.R. 1932 Cal. 589. But if the document that is deposited shows no kind of title of the depositor in the property, and there are documents in existence showing his title to the property which are not deposited, an equitable mortgage cannot be said to have been validly created—*Venkataramayya v. Narasinga Rao*, 21 M.L.J. 454, 9 I.C. 309.

If part of the material documents of title be deposited with one person, and part with another, each depositary may have a good security, unless there be evidence of a contrary intention—*Roberts v. Croft*, 24 Beav. 223; *Fisher on Mortgage*, 5th Ed., p. 17. Thus, one S held two plots of land and a building thereon by virtue of a registered sale-deed. He also possessed the original lease-deeds under which the plots were held by his vendor. He deposited the sale-deed and also the lease deed with respect to one of the plots with A, and thereafter deposited the other lease deed with B. On each of the lease-deeds there was an endorsement that the property had been sold to S. *Held* that as A had title-deeds with regard to the whole property, an equitable mortgage was created on the whole property in his favour, although he did not possess the other lease-deed. *Held* also that an equitable mortgage was created in favour of B also, but A's mortgage had priority over that of B—*Chettyar Firm v. Chettyar Firm*, 7 Rang. 28, A.I.R. 1929 Rang. 65 (68), 116 I.C. 475.

A *patta* of land is a document of title by depositing which an equitable mortgage may be created—*Official Assignee v. Basudevadass*, 48 Mad. 454, A.I.R. 1925 Mad. 723, 48 M.L.J. 423.

A tax-receipt and a copy of a map are not documents of title—*Majoo Tean v. Ma Thein*, 10 Rang. 403, A.I.R. 1932 Rang. 185, 140 I.C. 487.

Where the original title-deeds have been lost, copies of such deeds may be deposited—*Mrs. Stewart v. Bank of Upper India*, 31 P.R. 1916, 34 I.C. 937. But unless it is proved that the original has been lost or is not available an attested copy would not be enough—*Surendra v. Mohendra*, *supra*.

(3) '**Intent to create a security thereon**':—The title-deeds must be deposited *with intent to create a security thereon*. Otherwise there is no equitable mortgage. Unless the deposit of title-deeds effects the transfer of an interest in a specific immovable property *for the purpose of securing* the payment of money advanced or to be advanced, it is absolutely nothing at all—*Imperial Bank of India v. U. Rai Gyaw Thu & Co. Ltd.*, 51 Cal. 86 (98) (P.C.), 1 Rang. 637, A.I.R. 1923 P.C. 211. Where one partner of an oil mill had mortgaged the mill, and the other partner, who was the managing partner, discharged the mortgage and took delivery of the title-deeds from the mortgagee, no equitable mortgage was created in favour of the managing partner merely because he took charge of the title-deeds, in the absence of an intent to create a security. He took charge of the title-deeds merely as manager and chief of the partnership business, and the transaction was to be treated as an advance from one partner to another to be paid off out of the profits—*Heng Moh v. Lim Saw*, 1 Rang. 545 (P.C.), 29 C.W.N. 12 (16, 17), 45 M.L.J. 776, A.I.R. 1923 P.C. 87, 75 I.C. 287. Both under the English and the Indian law, mere possession of title-deeds by the creditor coupled with the existence of a debt does not necessarily lead to a presumption of an equitable mortgage in the absence of an intention to create a security—*Jethabai v. Putlibai*, 14 Bom.L.R. 1020, 17 I.C. 722; *Darbari v. Khetra*, 8 P.L.T. 85, A.I.R. 1927 Pat. 41 (42); *Featherston v. Fenwick*, 1 Br. C.C. 270n; *Behram v. Sorabji*, 38 Bom. 372, 23 I.C. 140; *Chapman v. Chapman*, 13 Beav. 308; Fisher on Mortgage, 5th Ed., p. 20. *A fortiori*, when there is *no existing* debt, the mere delivery of title-deeds is not sufficient to create an equitable mortgage unless it is accompanied with an agreement that the deeds should stand as security for future advances—*Jaitha v. Haji Abdul*, 10 Bom. 634 (645); *Dixon v. Muckleston*, L.R. 8 Ch. 155; *Ganpat v. Adarji*, 3 Bom. 329.

Where there is a debt in existence and title-deeds are deposited by the debtor with the creditor to secure the debt, an equitable mortgage is at once created, even though the deeds are deposited with the express purpose of having a legal mortgage prepared—*Dayal v. Jivraj*, 1 Bom. 237 (241). But if at the time when the title-deeds were deposited with the purpose of having a legal mortgage prepared, there was *no antecedent or existing debt nor* was any oral agreement made that the title-deeds should stand as a security for future advances, it cannot be said that the deposit was made with the intention of creating a security thereon; and therefore there was no equitable mortgage; and if the legal mortgage subsequently executed became invalid through want of registration, the creditor could not fall back upon the deposit of title-deeds as creating an equitable mortgage—*Jaitha Bhima v. Haji Abdul*, 10 Bom. 634 (644, 645); *Madras Deposit Society v. Oonamalai*, 18 Mad. 29 (30). "Certainly, if, *before* the money was advanced, the deeds had been deposited with a view to prepare a future mortgage, such a transaction could not be considered as an equitable mortgage by deposit; but it is otherwise where there is a *present advance*, and the deeds are deposited under a promise to forbear

from suing, although they may be deposited only for the purpose of preparing a future mortgage. In such a case the deeds are given in as part of the security and become pledged from the very nature of the transaction"—*Keys v. Williams*, 3 Y. & C. 55 (61).

Priority:—A mortgage by deposit of title-deeds under a verbal arrangement to secure payment of a debt is a complete act by itself and not a mere "oral agreement or declaration" within the meaning of sec. 48, Registration Act. The holder of a registered instrument does not by virtue of that section take priority over an equitable mortgage by deposit of title-deeds—*Gokul Das v. Eastern Mortgage Agency Ao.*, 33 Cal. 410 (422); *Coggan v. Pogose*, 11 Cal. 158; *Mrs. Stewart v. Bank of Upper India*, 31 P.R. 1916, 34 I.C. 937. See the new *Proviso* to sec. 48, Registration Act, added by Act XXI of 1929. (Appendix V.)

Extent of security:—An equitable mortgage will be a security only for the debt specified in the agreement, and will not include debts previously due from the mortgagor to the mortgagee—*Mountford v. Scott*, T. & R. 274; but it may include such debts, if an intention that it should do so appears from the circumstances—*Ex parte Farley*, 1 M.D. & DeG. 688; *Fisher on Mortgage*, 5th Ed., p. 19.

An equitable mortgage will affect the beneficial interest of the mortgagor in all the property comprised in the deposited documents including accessions—*Manningford v. Toeman*, 1 Col. 670; *Bhupendra v. Wajihunnissa*, 2 P.L.J. 293 (299, 301). Compare sec. 70. It will operate not only on the interest of the debtor at the time of the deposit but also on any interest which he may subsequently acquire—*In re Susty*, 69 L.T. 160. But an equitable mortgage of a house will not comprise an entirely separate house, attached to that house, which is not included in the title-deed. The rule is that where titles of property are handed over with nothing said except that they are to be security, the law supposes that the *scope of the security is the scope of the title*—*Pranjivandas v. Chan Ma Phee*, 43 Cal. 895 (900) (P.C.). An equitable mortgage of a house and godown cannot include a machinery, unless it is attached to the house for the permanent beneficial enjoyment thereof, within the meaning of sec. 8—*Veerappa v. Ma Tin*, 4 Bur.L.J. 52, 88 I.C. 1011, A.I.R. 1925 Rang. 250.

ANOMALOUS MORTGAGE:

See the new clause (g). Under the old section 98, an anomalous mortgage was a mortgage "not being a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage or an English mortgage, or a combination of the first and third or the second and third of such forms." In other words, a simple mortgage usufructuary (*i.e.*, a combination of a simple and a usufructuary mortgage) and a mortgage usufructuary by conditional sale (*i.e.*, a combination of a usufructuary mortgage and a mortgage by conditional sale) did not fall under the old definition of an anomalous mortgage. See for instance *Lal Narsingh v. Mohammad Yakub*, 4 Luck. 363 (P.C.), 33 C.W.N. 693 (698), and *Kandula Venkiah v. Donga Pallaya*, 43 Mad. 589 (600), where a combination of a simple and usufructuary mortgage was held not to be an anomalous mortgage. Under the present clause (g) of section 58, those two classes of mixed mortgages will be included in anomalous mortgages.

"Section 98 only deals with certain classes or types of anomalous mortgages and is not exhaustive. We think it would be better to define

anomalous mortgages as covering all mortgages other than those defined in clauses (b) to (f) of section 58 and that the definition should be inserted in this section as a separate clause. The rights and liabilities of the parties under anomalous mortgages should be dealt with in section 98."—*Report of the Special Committee.*

In construing mortgages of this kind the Courts should be guided by the following principles: In the first place, Courts should not be astute to take a transaction out of the category of recognised mortgages. In the second place, the essential elements of the transaction should be examined to find out whether the constituent parts of the recognised mortgages are found in it. The third principle is that in finding whether there has been a combination or not, the intention of the parties must be given paramount weight to. It is not merely the language in which the document is worded that should conclude Courts. It is really the substance of the transaction that should be looked into—*Kandula Venkiah v. Donga Pallayya*, 43 Mad. 589 (603) (F.B.).

Anomalous mortgages will now include the following classes:—

- (a) combination of simple and usufructuary mortgage;
- (b) combination of mortgage by conditional sale and usufructuary mortgage;
- (c) local mortgages, such as *otti*, *kanom*, etc.;
- (d) other miscellaneous forms.

These are considered below in detail:—

347. Combination of simple and usufructuary mortgage:—In a pure usufructuary mortgage, the principal or interest or both are contracted to be satisfied out of the usufruct of the property. The mortgagee, so long as he remains in possession, has no right to claim the mortgage-money, and the mortgagor undertakes no personal liability. But where there is a *personal covenant* to pay the mortgage-debt, such covenant is inconsistent with a pure usufructuary mortgage, and it becomes a combination of a *simple and usufructuary mortgage*—*Jafar Husen v. Ranjit*, 21 All. 4 (8, 10); *Kangayya v. Kalimuthu*, 27 Mad. 526 (527) (F.B.); *Ramarayaningar v. Maharaja of Venkatagiri*, 50 Mad. 180 (P.C.), A.I.R. 1927 P.C. 32 (36); *Fida Ali v. Ismailji*, 6 N.L.R. 20, 5 I.C. 701; *Dattambhat v. Krishnabhat*, 34 Bom. 462 (466); *Ramayya v. Guruva*, 14 Mad. 232 (234); *Sivakami v. Gopala*, 17 Mad. 131 (132). Thus, a mortgage-deed after acknowledging receipt of the consideration and mortgaging the land with possession (the usufruct apparently being in lieu of interest) contained the following provision as to redemption: "Thereafter on (date) on paying the aforesaid Rs. 200 we shall redeem or recover back our land. If on the date so fixed the amount be not paid, in whatever year we may pay the Rs. 200 in full on the 30th Panguni in any year, then you shall deliver back our lands to us." *Held* that the first sentence contained a promise by the mortgagor to pay on the date named, and that the mortgage was a combination of a simple and usufructuary mortgage—*Kangayya v. Kalimuthu*, 27 Mad. 526 (527) (F.B.). A mortgage provided for payment of interest and compound interest; it also provided that the mortgagee should take possession and enjoy the net profits in lieu of interest and during the time of such possession the interest and the profits should be deemed equal; and it was further agreed that if the profits did not cover the amount of interest, the mortgagors would make good the deficiency from their pockets in accordance with the accounts prepared

by the agent of the mortgagee. It was a combination of a simple and a usufructuary mortgage—*Jawahir v. Someshar*, 28 All. 225 (231) (P.C.). Where by a mortgage, landed property was hypothecated, the mortgagee to get and retain possession, appropriating the profits, after payment of revenue, towards interest, and any further surplus towards principal, but by a further clause it was stipulated that the mortgagors should remain entitled to enhance the rents, eject tenants, cultivate land and grant leases, and that the mortgagee like the mortgagors should possess all the remaining powers during his possession, *held* that the mortgage was a combination of simple and usufructuary mortgage—*Lal Narsingh v. Md. Yakub*, 4 Luck. 363, 33 C.W.N. 693 (698) (P.C.). The terms of a mortgage were as follows:—"Possessory mortgage-deed of immovable property for Rs. 50.... This sum with interest thereon at Re. 1 per cent. per month I shall pay you on 23-8-11. If I fail to pay on that date I shall give up the said land as sold to you and execute a proper sale-deed. The property has been delivered possession to you on this very date....you shall appropriate the profits towards interest." *Held* that the first portion of this deed with its covenant to repay with interest contained all the essentials of a simple mortgage, and the latter part (appropriation of profits towards interest) contained the elements of an usufructuary mortgage. It was therefore a combination of the two—*Kandula Venkiah v. Donga Pallaya*, 43 Mad. 589 (599) (F.B.). A mortgage-bond provided as follows—"The whole debt, including principal and interest will be paid in 4 years.... If the amount due to you on account of principal and interest be not paid within the time fixed, then you are to take up the management of the land and house. We have this day put the said land and house into your possession." *Held* that it was a combination of simple and usufructuary mortgage—*Motiram v. Vitai*, 13 Bom. 90 (94). When a due date has been fixed for the payment of the mortgage-money, the mortgage is not a purely usufructuary mortgage—*Jag Sahu v. Ram Sakhi*, 1 Pat. 350 (355).

But in an Allahabad case it has been held that where the mortgage is in other respects a usufructuary mortgage (*e.g.*, where interest is stipulated to be taken out of the usufruct), the mere insertion of a personal covenant to pay the mortgage debt, unaccompanied by a *hypothecation* of the property (*i.e.*, without an indication of an intention on the part of the mortgagor to charge the mortgaged property with the payment of the entire mortgage-debt) cannot alter the character of the mortgage, and it is still a pure usufructuary mortgage—*Kashi Ram v. Sardar Singh*, 28 All. 157 (160) (dissenting from 14 Mad. 232 and 17 Mad. 131).

348. Mortgage usufructuary by conditional sale:—This is a combination of a mortgage by conditional sale and a usufructuary mortgage.

As instances of this kind of mortgage, mention may be made of *Katkabala Muddata Kriyam* (*Ramasami v. Samiappa*, 4 Mad. 179) or *Bye-bil wafa* with possession (*Girwar Singh v. Thakur Narain*, 14 Cal. 730). A mortgage with possession provided that the rents and profits should be set off against the interest, that the mortgage should not be redeemable for 5 years, and that if the mortgage was not redeemed within a period of 20 years, the mortgagee should treat the lands as having been sold to him absolutely. *Held* that the mortgage was an anomalous mortgage, or a combination of a usufructuary mortgage and a mortgage by

conditional sale—*Narayanamurthi v. Appalanarasimhulu*, 41 M.L.J. 563, 68 I.C. 717. A mortgage-deed covenanted that the mortgagee should have possession of the mortgaged property in lieu of interest, that the mortgage-debt was payable at the end of the year 1307, and that if the mortgagors failed to pay the amount of the debt at the end of the specified period the mortgagee should be at liberty to foreclose according to law. *Held* that the mortgage combined the incidents of a mortgage by conditional sale with an incident of a usufructuary mortgage—*Sita Nath v. Thakurdas*, 46 Cal. 448 (452).

Under a mortgage usufructuary by conditional sale, if the mortgagee fails to obtain possession, he is entitled to sue for possession of the mortgaged property, or for the mortgage money at once under sec. 68. But he is not bound to take the former course, nor is he obliged under sec. 68 to sue at once. It is open to him to bring a suit for the recovery of the mortgage-debt with interest, the money to be realised by foreclosure. This suit is in effect a suit under secs. 67 and 68 combined—*Sita Nath v. Thakurdas*, 46 Cal. 448 (454).

348A. Local forms of Anomalous mortgage:—(1) *Otti* mortgages of Malabar. An *otti* mortgage, according to Malabar law, is not redeemable before the expiration of 12 years from the date—*Edathil v. Kapasham*, 1 M.H.C.R. 122; *Keshava v. Keshava*, 2 Mad. 45.

(2) *Kanom* mortgages of Malabar. A *Kanom* is an anomalous mortgage—*Chandan v. Muhammad*, 1914 M.W.N. 618. A *Kanom* may be a lease or a mortgage; it is a mere lease, if a sum is advanced as security for the rent or proper cultivation, to be repaid on the expiry of the term; and is a mortgage, if it is made to secure a loan advanced to the *jenmi*—*Silapani v. Ashtamurthi*, 3 Mad. 382 (F.B.). But ordinarily, and in the absence of special circumstances, it is to be treated as a mortgage—*Raman v. Krishna*, 6 Mad. 325 (326). And since it partakes of the nature of a usufructuary mortgage and a lease, it is an anomalous mortgage—*Kannakurup v. Sankarvarma*, 44 Mad. 344. A *kanom* mortgage also, like an *otti* mortgage, cannot be redeemed before the lapse of 12 years from the date of its execution, unless the parties have by express contract provided for its redemption at an earlier date—*Kelu Nedungadi v. Krishnan*, 26 Mad. 727 (728); *Kanara v. Govindan*, 5 Mad. 310.

(3) *Illudarwara* of Malabar.—See 1 M.H.C.R. 81 and 4 Mad. 113.

(4) *Paruartham* of Malabar. The characteristic feature of this kind of mortgage is that in redeeming the mortgage, the market-value of the land at the time, and not the amount for which it was mortgaged, is to be paid before restoration of the mortgaged land—*Shekari Varma v. Mangalam*, 1 Mad. 57.

(5) *San* mortgage of Gujerat. Its peculiarity is that the *san* mortgagee without possession has priority over a subsequent *bona fide* purchaser with possession—*Paramaya v. Sonde Shrinivasapa*, 4 Bom. 459.

348B. Other instances of anomalous mortgage:—A contract of mortgage by which the mortgagor, in lieu of a sum due on account, made over to the mortgagee certain land for enjoyment for a certain number of years “in liquidation of the aforesaid rupees, and after the expiry of the said period the mortgagees will have no right whatever to the land,” was held to be an anomalous mortgage—*Tukaram v. Ramchand*, 26 Bom. 252. Under a usufructuary mortgage, the mortgagee is entitled to remain

in possession 'until payment of the mortgage-money' (sec. 58), so that no period of time can be fixed during which the mortgage is to subsist; if however the parties stipulate that the mortgage is for a definite period during which the mortgagee is to remain in possession, and after the end of the period the mortgagor shall be entitled to redeem, the mortgage does not strictly fall under the definition given in sec. 58 (*d*) but will be treated as an anomalous mortgage—*Hikmatulla v. Imam Ali*, 12 All. 203 (205). So also, where a mortgage-deed ran as follows:—"As we have received Rs. 500, you will in lieu of the said amount and interest, enjoy the said property for three years by virtue of the *arakatta otti*....on the condition that, on the expiry of the said three years, we should redeem the land without paying either principal and interest. You will, on the expiry of the said period, deliver possession of the said immoveable property, without raising any objection." *Held* that the instrument created an anomalous mortgage—*Visvalinga v. Palaniappa*, 21 Mad. 1 (3).

A mortgage-deed provided that the mortgagee would be put in possession of the mortgaged properties and appropriate the usufruct towards payment of interest, after paying the landlord's rent; that the mortgagor would pay off the debt within 8 years and take back the properties; that in case of default the mortgagee would be entitled to recover his dues by suit, by sale of the mortgaged properties as well as other properties of the mortgagor; and that in case any hindrance or obstruction was offered to the possession of the mortgagee, he would be entitled forthwith to sue for and recover the amount of the bond. *Held* that the mortgage was neither simple nor usufructuary but an anomalous mortgage—*Gajadhar v. Sibananda*, 28 C.W.N. 532, 81 I.C. 768, A.I.R. 1924 Cal. 592. A mortgage with possession for a fixed term without any provision for accounting is in the nature of an anomalous mortgage, and it automatically redeems itself at the end of the fixed period—*Bhika v. Sheikh Amir*, 19 N.L.R. 1, A.I.R. 1923 Nag. 60 (61). In a mortgage bond it was provided thus: "we shall pay off your said amount within three years from to-day. But if in the meantime a third party brings any suit against us or any one of us and attaches or brings into auction any property of us, then without waiting for the due date you shall forthwith bring a suit for foreclosure of this *Katkobala* and having got a decree shall be the owners of the properties mentioned in the schedule below." *Held* that this was an anomalous mortgage, and not a mortgage by conditional sale—*Solema v. Hafez*, 54 Cal. 687, A.I.R. 1927 Cal. 836, 104 I.C. 833. Where in a mortgage-deed there was a covenant by the mortgagor to pay interest, but no covenant to repay the principal, and subsequent to the execution of the mortgage, the mortgagor deposited certain title-deeds not mentioned in the mortgage-document, as further security, *held* that this was neither a simple nor an equitable mortgage, but an anomalous mortgage—*Gupta v. Administrator-General*, 5 Rang. 558, A.I.R. 1928 Rang. 16 (17).

348C. Sub-mortgage:—In ordinary parlance, the term "sub-mortgage" is often used as synonymous with a puisne mortgage, but the two are really different. Puisne mortgage means a second or subsequent mortgage executed by the mortgagor; but a sub-mortgage is a "mortgage of a mortgage," i.e., a mortgage executed by the mortgagee of his security under the original mortgage. A mortgage may be transferred by the mortgagee to some creditor of his own by way of mortgage; such a mortgage of a mortgage is known as "sub-mortgage."

A sub-mortgage may be made either by an assignment by the mortgagee of his interest, or by deposit of title-deeds where this is permissible.

A sub-mortgagee of mortgage-rights in immoveable property is entitled to a decree for sale of the mortgage-rights of his mortgagor—*Ram Shankar v. Ganesh*, 29 All. 385 (F.B.). In a properly constituted suit, the sub-mortgagee may have a sale of the interest mortgaged to him, subject to the right of redemption of the original mortgagor—*Ibid* (at p. 406).

A sub-mortgage is only good to the extent of the amount due on the original security, on payment of which the security is released and the deeds must be handed back to the mortgagor—*Mathews v. Wallwyn*, 4 Ves. 118; *Maung Shan v. U Po*, 5 Rang. 749, A.I.R. 1928 Rang. 30 (31). The sub-mortgagee cannot recover anything more than the amount due to the original mortgagee from the original mortgagor, whatever may be the state of the account between himself and the original mortgagee—*Nga Kye v. Nga Po Min*, U.B.R. (1906) Sub-mortgage 1. And the original mortgagee cannot recover from the original mortgagor anything more than the amount stipulated in the mortgage, whatever may be the contract between the mortgagee and his sub-mortgagee—*Imdad Hasan v. Badri*, 20 All. 401 (408). The sub-mortgagee becomes an assignee of the debt. Under all legal principles he is entitled therefore to recover the debt and to realize it from the security, though he is bound, no doubt, to render an account of the sum recovered, and, if it exceeds the sum due to him, to pay over the surplus to his own mortgagor—*Chela Ram v. Walidad*, 31 P.R. 1900 (F.B.). The original mortgagor is entitled to sue the sub-mortgagee for redemption; conversely the latter may sue the former for recovery of his money out of the mortgaged property—*Nga Kye v. Nga Po*, supra.

The position of the original mortgagee in relation to the sub-mortgagee is that of a surety, and he is thus entitled to recover the debt from the original debtor, but is bound to pay it over to the sub-mortgagee in discharge of the sub-mortgage—*Gurney v. Seppings*, 2 Phil. 40. If payment of the original mortgage-debt is made by the original mortgagor to the original mortgagee without notice of the sub-mortgage, the sub-mortgage is extinguished, and the sub-mortgagee cannot hold the property against the original mortgagor—*Maung Shan v. U Po*, supra. See also *Sahadev v. Sheikh Papa Miya*, 29 Bom. 199 (202). If the original mortgagor had notice of the sub-mortgage, he is bound to pay his debt to the sub-mortgagee, and the sub-mortgagee can hold the property against the original mortgagor, till the sub-mortgage is redeemed—*Nga Kye v. Nga Po*, supra; *Ma Myat v. Ma Nyan*, 2 Rang. 561 (565), A.I.R. 1925 Rang. 140.

The sub-mortgagee, by virtue of his assignment, is not only entitled to the usual remedies against his mortgagor (i.e., the original mortgagee) but is also entitled to a remedy against the original mortgagor; the position of the original mortgagee after the sub-mortgage becomes that of a surety, the sub-mortgagee becomes the creditor and the original mortgagor continues to remain the debtor. The original mortgagee is not entitled to exercise a power of sale as against the mortgagor. The sub-mortgagee is not bound by the result of any suit brought by the original mortgagee, for the operation of the sub-mortgage is to transfer to the sub-mortgagee all the rights and remedies the original mortgagee had against the original mortgagor. Where the debt has not been discharged, and the original mortgagee has merely obtained a decree on his mortgage, which he has

failed to execute within limitation, there is no bar to the exercise of the sub-mortgagee's right to the sale of the mortgaged property—*Kanhaiya Lal v. Mahadeo*, 18 I.C. 389 (Oudh).

Where in ignorance of the existence of a sub-mortgage, the original mortgagor substituted the original mortgage by another mortgage covering a distinct property, and the sub-mortgagee brought a suit for sale of the original property sub-mortgaged to him, *held* that the substitution of the original mortgage by a new one in favour of the mortgagee did not extinguish the sub-mortgage, and therefore the sub-mortgagee was entitled to bring the mortgagee's interest under the earlier mortgage to sale. *Held* also that the mortgagor's remedy against the sub-mortgagee was just what he would have had against the original mortgage, if the latter sought to enforce his debt against that particular property, *viz.*, to redeem by paying the amount sued for—*Chakrapani Chetty v. Lakshmi Achi*, 35 M.L.J. 309, 45 I.C. 769.

There is no necessity for the original mortgagee to give notice of the sub-mortgage to the mortgagor, and such want of notice will not render the sub-mortgage invalid—*Ibid*.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage, *other than* a mortgage by deposit of title-deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab and in any other town which the Governor-General in Council may, by notification in the *Gazette of India*, specify in this behalf, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

(*Omitted.*)

Amendment:—By sec. 20 of the T. P. Amendment Act (XX of 1929), the italicised words have been added in the first para, and the last para has been omitted. The addition of the words in the first para is consequential to the omission of the last para; and this last para has

been transferred to clause (f) of sec. 58 with slight verbal alterations. See Note 356.

348D. Principal money secured:—The term “principal money secured” is intended to show that *interest* or any other addition is not to be taken into account in calculating the value of the instrument for the purpose of registration—*Habibulla v. Nackched*, 5 All. 447 (F.B.); *Ramdoolary v. Thacoor*, 4 Cal. 61; *Kattamuri v. Padalu*, 5 Mad. 119; *Nago v. Babaji*, 8 Bom. 610; *Laxman Rao v. Kesho*, 4 N.L.R. 90; *Gama v. Lahanoo*, 4 N.L.R. 86. A bond showed that Rs. 90 was due and the mortgagor agreed to pay that sum in 18 years by six-monthly instalments of Rs. 5 each carrying a certain interest. He was, in case of default, liable for the payment of the whole sum of Rs. 180 plus interest. *Held* that the principal sum secured by the mortgage was Rs. 90, and that the deed did not require registration—*Jodh Ram v. Lajja Ram*, 11 A.L.J. 729, 21 I.C. 78.

349. Registration:—Prior to the amendment of clause (c) of sec. 58, a mortgage by conditional sale was usually effected by means of two deeds, one purporting to be a deed of sale and the other containing an agreement to reconvey within a certain period; and both documents had to be registered. If, in such a case, the deed of sale was alone registered and the agreement to reconvey was unregistered, the latter document was inadmissible in evidence for the purpose of showing that the agreement along with the absolute conveyance constituted a mortgage by conditional sale—*Puttisesha v. Kuppachar*, 1919 M.W.N. 87; *Namdev v. Dhondu*, 22 Bom.L.R. 979; *Muthu Venkatachelopati v. Pyunda Venkatachelopati*, 27 Mad. 348. Under the present law, however, a mortgage by conditional sale must be effected by only *one* document. See Note 338 under sec. 58.

Under the first para of this section, a simple mortgage for Rs. 100 or upwards, must be effected by a registered instrument. The second para lays down that a mortgage under Rs. 100 may be effected either by a registered instrument or by delivery; but delivery of possession does not take place in a simple mortgage. So, a simple mortgage can be effected only by a registered instrument, irrespective of the amount of the loan—*Mg. Shwe Bya v. Chawari*, 4 Bur.L.T. 219, 12 I.C. 25.

(It should be noted that the words “registered instrument” in the second para have been substituted by the Amendment Act of 1904 for the words “an instrument”; and therefore prior to 1904, a simple mortgage of value less than Rs. 100 could be created by an unregistered instrument.)

In case of the other kinds of mortgage, if the money secured is less than Rs. 100, delivery of possession would be sufficient. The validity of such a possessory mortgage is not liable to be affected by the fact that an unregistered document is also executed—*Habibur v. Rasul*, 19 A.L.J. 376, 62 I.C. 859. But if the mortgage is made in writing, and no delivery of possession takes place, the writing must be registered, for sec. 4 has abolished optional registration in respect of all instruments executed after 11th March 1904. Compare the cases cited in Note 290 under sec. 54. As to competition between possession and registration, see the analogous cases of sale in Note 291 under sec. 54. The holder of a prior unregistered mortgage (which is not compulsorily registrable) *with possession* cannot be defeated by a subsequent mortgagee under a registered deed, because the possession of the prior mortgagee would amount to *notice* to

the subsequent mortgagee—*Bhikki v. Udit Narain*, 25 All. 366 (370); *Krishnamma v. Suranna*, 16 Mad. 148 (170).

An unregistered simple mortgage cannot stand in competition with any other valid mortgage.

Invalid registration:—If a property has been introduced in a mortgage bond, which has either no existence or does not belong to the mortgagor, with a view to effect the registration of the bond in a particular office, the registration must be deemed to be invalid, with the result that there is no enforceable security under section 59 of this Act—*Kedarnath v. Jayanta*, 38 C.L.J. 355, 70 I.C. 583, A.I.R. 1924 Cal. 348.

Effect of non-registration:—If a transaction intended to be a mortgage, and requiring registration, is not registered, the mortgage is not converted into a charge under sec. 100—*Somasundaram v. Nachiappa*, 2 Rang. 429 (436); *Maung Tun v. Mg. Aung Dun*, 2 Rang. 313 (318). See Note 533 under sec. 100.

An unregistered deed of simple mortgage is not receivable in evidence for the purpose of affecting immoveable property, but it will be received as evidence of a *personal obligation* and will be admissible to prove the debt for the purpose of granting a simple money decree—*Kattamuri v. Padalu*, 5 Mad. 119; *Ulfatunnissa v. Hossain Khan*, 9 Cal. 520 (F.B.); *Vani v. Bani*, 20 Bom. 553; *Comaji v. Subbarayappa*, 15 Mad. 253; *Jadu v. Bhagwat*, 7 A.L.J. 71; *Ram Autar v. Ram Asre*, 66 I.C. 680 (Oudh); *Myat Thin v. Kasiviswanathan*, 4 L.B.R. 52; *Nemdhari v. Bissessuri*, 2 C.W.N. 591; *Sadu v. Basaviah*, 17 M.L.J. 167; *Quan Cheng v. Maung Po*, 66 I.C. 589. It may also be admissible in evidence to prove an acknowledgment of liability on the part of the executant sufficient to save limitation—*Mugniram v. Gurmukh*, 26 Cal. 334; *Sheo Dial v. Prag Dat*, 3 All. 229; *Lachman Singh v. Kesri*, 4 All. 3. See the new proviso to sec. 49, Registration Act, added by Act XXI of 1929. (Appendix V).

Until the mortgage-deed has been registered, the mortgagee is not under any obligation to advance any mortgage-money to the mortgagor. Consequently, it is not open to the creditor of the mortgagor to attach the mortgage money in the hands of the mortgagee until registration of the mortgage—*Tulsiram v. Harakh Narain*, A.I.R. 1922 All. 384 (385).

But non-registration may be cured if the mortgage has been acted upon by the parties for a long period. Thus a money decree for Rs. 300 was compromised by the parties, and they came to an agreement (which was embodied in an application to the Court) under which the plaintiffs were put in possession of certain plots belonging to the defendants, and it was further agreed that the plaintiffs would take the usufruct in lieu of interest and the defendants would be entitled to redeem on payment of Rs. 300. The agreement embodying the compromise was not registered but the plaintiffs remained in possession for more than fifty years, when it was challenged on the ground of want of registration and attestation. *Held* that although the formalities had not been complied with, still it is now far too late to challenge a mortgage which has in fact been given effect to for 50 years—*Ram Sewak v. Sheo Naik*, 45 All. 388 (389). It is for the mortgagee to have a proper and valid mortgage-deed executed in his favour. Therefore, where a mortgagee takes possession of the mortgaged property under a deed which requires registration but is not

registered, the principle "once a mortgage always a mortgagee" applies, and he cannot be permitted to resist the redemption by the mortgagor—*Rajpati v. Sukwaro*, 63 I.C. 400 (Pat.).

An unregistered deed of usufructuary mortgage (for more than Rs. 100) cannot be recognized by the Court in proof of the mortgage, and consequently a suit by the mortgagor for redemption, on the basis of the unregistered mortgage, is not maintainable—*Ma Thaing v. Maung Chit*, 7 Rang. 140, A.I.R. 1929 Rang. 179 (180). In this case the mortgagee did not obtain possession. But if the mortgagee obtains possession under an unregistered usufructuary mortgage, he will be entitled to retain possession until the debt is paid off. The mortgagor cannot bring a suit for redemption, the mortgage being invalid, but he will be entitled to bring a suit for possession on his offering to repay the loan, and the Court will decree the suit conditional on his repaying the amount of the loan—*Maung Tun v. Maung Aung Dun*, 2 Rang. 313 (317, 318); *Maung Po Sin v. Mg. Po Sin*, 5 Bur.L.J. 106, A.I.R. 1926 Rang. 201 (202). These cases will now be decided under sec. 53A.

350. "Signed":—The term "signature" is not defined in the Transfer of Property Act but its definition is to be found in the General Clauses Act of which sec. 3 (52) runs as follows:—"Sign" with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include 'mark' with its grammatical variations and cognate expressions." It is clear therefore that an illiterate mortgagor may sign a mortgage by affixing his mark—*Gobind v. Bhanu*, 41 Bom. 384 (388). A signature may be put down in various ways. The executant may sign by pen and ink, or put his name down by means of types, or if he uses a facsimile for signing his name he may use it for his signature—*Nirmal Chandra v. Saratmani*, 25 Cal. 911.

The words "signed by the mortgagor" do not mean that the mortgagor must personally sign the document; the mortgage-deed may be signed by another for him and under his authority on the principle *qui facit per alium facit per se* (he who acts through another acts through himself). Before the T. P. Act was passed, a mortgage was a good instrument, whether it was signed by the mortgagor personally or by some other person signing for him, and it is not the intention of the present Act to curtail that freedom—*Deo Narain v. Kukur Bind*, 24 All. 319 F.B. (overruling *Moti Begum v. Zorawar*, 1889 A.W.N. 196); *Sasi Bhusan v. Chandra Peshkar*, 33 Cal. 861; *Sristidhar v. Rakshakaly*, 49 Cal. 438. The insertion of the words "on behalf of" in sec. 123 and the omission of those words in section 59 cannot be taken to show that the Legislature intended to lay down in sec. 59 a different rule from that provided in sec. 123. Further, to hold that the Legislature requires that the personal signature of the executant is indispensable in the case of a mortgage which is only the transfer of an interest in the immoveable property, while it does not require the same in the case of a gift or a sale whereby the vendor's immoveable property is absolutely transferred, is an anomaly, and a construction which leads to such anomaly should not be adopted—*Deo Narain v. Kukur Bind*, 24 All. 319 F.B. (*per* Banerji, J.). Where the executant of a document is illiterate, some other person can sign his name on the document on his behalf in his presence and at his request—*Ibid*; *Sashi Bhusan v. Chandra Peshkar*, 33 Cal. 861; *Ram Charan v. Bhikari*, 12 O.C. 257.

350A. Proof of execution:—Sec. 68, Evidence Act provides: “If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution.... Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.” (This proviso has been added by the Indian Evidence Amendment Act, XXI of 1926).

Sec. 70, Evidence Act lays down: “The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.”

These sections relate to the manner in which a deed should be legally proved. But they have nothing to do with the question about the legality or validity of the instrument itself as a document of title if there has been no attestation as required by law. In other words, if the document is void for want of proper attestation, any proof of execution of the document under these sections is out of the question—*Balbhaddar v. Lakshmi*, 1930 A.L.J. 623, A.I.R. 1930 All. 669 (673), 125 I.C. 507.

The *validity* of a mortgage-bond and the *proof of its execution* are two different questions. And so even though the execution of the bond is admitted by the executant and consequently need not be proved by calling in an attesting witness under sec. 68, by virtue of the provisions of sec. 70, still if any question is raised as to the validity of the deed owing to improper attestation (*e.g.*, by a scribe), *held* that evidence must be given that the document was properly attested—*Paban v. Badal*, 26 C.W.N. 951 (953), 34 C.L.J. 498, A.I.R. 1921 Cal. 276, 66 I.C. 906.

The proviso to sec. 68 lays down that no proof under that section is necessary unless the executant *specifically* denies the execution of the document. Where the executant says that “he has no knowledge of the mortgage, and that if it is genuine, it must be hollow,” *held* that these words mean that the executant neither admits nor denies the genuineness of the mortgage, but that he asserts absence of consideration if it is held to be genuine; these words do not amount to specific denial, and consequently it is not necessary to call an attesting witness in proof of the execution—*Yakub Khan v. Gujar Khan*, 52 Bom. 219, A.I.R. 1928 Bom. 267 (268), 111 I.C. 287. The mere fact that the executant of a mortgage does not admit the genuineness of the bond, or says that the attesting witnesses did not sign as witnesses or did not sign at the proper place in the bond, does not amount to specific denial of the execution of the bond; and therefore does not necessitate any proof of attestation—*Biswanath v. Kayastha Corporation*, 8 Pat. 450, 10 P.L.T. 379, 119 I.C. 405, A.I.R. 1929 Pat. 422 (423).

The word “execution” in sec. 70 means *due* execution or execution in a way in which the document is required to be executed. If the mortgagor admits his having signed the document but denies his having done so in the presence of attestors, *held* that such admission does not amount to admission of *due* execution, and cannot dispense with proof of execution—*Arjun v. Kailash*, 27 C.W.N. 263, 36 C.L.J. 373, 70 I.C. 532, A.I.R. 1923 Cal. 149. See also 5 Pat. 58 (P.C.) cited in Note 354.

351. Attestation:—The provision as regards attestation has been newly introduced by the Transfer of Property Act. A mortgage-deed executed prior to the passing of this Act did not require attestation by witnesses—*Jati Kar v. Makunda*, 39 Cal. 227.

See the new definition of 'attested' in sec. 3, and Notes at p. 19 *ante*.

The requirements of this section as to attestation apply to an anomalous mortgage. Such a mortgage is invalid if it is not attested—*Kannakarup v. Sankaravarma*, 44 Mad. 344, 62 I.C. 386.

Attestation means simply witnessing the execution of a document, in order that the person attesting may subsequently testify that the deed was actually executed by the person whose name appears as executant. It does not import anything more, and therefore it must be distinguished from cases where a person signs a document not merely as a witness to the execution but also with a view to giving consent to the transaction. Such cases frequently arise where a Hindu widow sells or mortgages her husband's property, and the reversioner signs her deed with the object of giving consent to the alienation. Such an act on the part of the reversioner ought not to be treated as 'attestation.' Similarly where a Hindu lady executed a deed of mortgage which was signed by two witnesses, one of whom was her husband, and it appeared that the husband had signed the document in order to evidence his approval of the transaction, *held* that the husband was not an attesting witness since he had signed in a capacity other than that of a witness, in spite of the fact that he signed in the place where the other witness had signed. The deed was therefore not validly attested by two witnesses—*Barkuarin v. Sircar Barnard & Co.*, 6 P.L.J. 473, 2 P.L.T. 761, 62 I.C. 668; *Sarkar Barnard & Co. v. Alak Manjari*, 83 I.C. 170 (P.C.), A.I.R. 1925 P.C. 89. The mere fact that a man was present and witnessed the execution of the deed and his name appeared on the deed does not lead to the conclusion that he was a good attesting witness. In all cases, the Court must have regard to the *purpose* for which a man's signature is on the document—*Abinash v. Dasarath*, 56 Cal. 598, 32 C.W.N. 1228 (1230), A.I.R. 1929 Cal. 123 (disapproving *Raj Narain v. Abdur Rahim*, 5 C.W.N. 454). Attestation means a certain act with reference to the execution of the document. The act must be done with the *intention* of attesting the executant's signature. So, a person who signs a document, which is executed by a pardanashin lady, before the Sub-Registrar under the registration endorsement, in proof of the fact that he has identified the lady, does not sign as an attesting witness—*Chandrani v. Lala Sheo Nath*, 8 O.W.N. 194, A.I.R. 1931 Oudh 146 (150), 132 I.C. 337.

Again, to attest means to bear witness; *i.e.*, attestation means the act of witnessing *another man's* signature; therefore a man who signs for and on *behalf* of the executant (who is illiterate) is not competent to sign also as a witness. The same person cannot simultaneously perform a double function; a person who executes the mortgage-deed on behalf of the mortgagor is not competent to become an attesting witness to attest the signature he himself has written out. An attester is a person who 'sees the document executed'; a person who executes a document on behalf of the executant is not a person who sees it executed when he himself does the very thing to which by subsequently signing as a witness he professes to bear witness—*Sristidhar v. Rakshakaly*, 49 Cal. 438 (441, 443); *Rajani Kanta v. Panchananda*, 23 C.W.N. 290, 48 I.C. 720; *Upendra v. Hukum*

Chand, 46 Cal. 522; *Ram Samujh v. Mainath*, 2 O.W.N. 853, A.I.R. 1925 Oudh 737; *Dharmadas v. Ramoomal*, 19 S.L.R. 322, A.I.R. 1927 Sind 118 (120). But where a lady executed a mortgage-deed by putting her finger mark to the same, and thereafter a person who saw her put the finger mark wrote her name at her request and added the words "by the pen of" before his name written by himself; it was held that the document was executed by the lady herself and not by him on her behalf, and that consequently he was a valid attesting witness—*Dinamoyee v. Banbehari*, 7 C.W.N. 160 (161); *Ram Samujh v. Mainath*, 2 O.W.N. 853 (so assumed). An illiterate person signed a mortgage-deed by putting his mark to it, which mark was described by the scribe of the deed who put his own signature below the description. Held that the scribe was a valid attesting witness. The execution was complete when the mortgagor unable to write his name placed his mark thereon; the mark was his signature and was independent of any description by which the mark was explained. The function of the scribe ended when he signed his name at the conclusion of the body of the document; he thereafter signed his own name under the description of the mark made by the executant, with a view to authenticate the mark, that is, to vouch the execution of the deed by the marksman, in other words, to act as an attesting witness—*Govind v. Bhanu Gopal*, 41 Bom. 384 (389), 19 Bom.L.R. 147, 39 I.C. 61.

As stated above, 'to attest' means only to witness the execution of a deed, and it is not necessary that the person attesting a document should sign his name personally. Just as in the case of an illiterate mortgagor some other person can sign the mortgagor's name on his behalf and under his authority, so in the case of witnesses who are illiterate and cannot write, it will be sufficient if their signatures are affixed for them by another person with their consent. There is no distinction in this respect between the signature of the mortgagor and the attestation by the witnesses—*Sashi Bhusan v. Chandra Peshkar*, 33 Cal. 861; *Lal Bahadur v. Rameshwar*, 4 O.W.N. 965, A.I.R. 1927 Oudh 510 (511), 3 Luck. 113. But in such a case, where one person signs for another, it must be shown that the former was authorised by the latter to sign for him: otherwise there is no valid attestation. Thus, where a document contained the signature of one attesting witness, and the name of another person was written on the margin by the scribe, but there was no signature or mark made by this second person and there was nothing to show that he had authorised the scribe to sign for him, held that the document was not duly attested by two witnesses, within the meaning of this section—*Paramhans v. Randhir*, 38 All. 461, 35 I.C. 748. In the case of illiterate witnesses, attestation by a mark is a sufficient attestation—*Shri Kishen v. Sonba*, 1 N.L.R. 14; *Chiranji Lal v. Purna*, 12 A.L.J. 1114; *Harrison v. Harrison*, 8 Ves. 185. Where a will was attested by one person in his own handwriting and he also held and guided the hand of a second witness who could not read or write, held that the attestation was sufficient—*Harrison v. Elvin*, 61 R.R. 183.

Where a document is executed by two persons at different times, each time the signature must be attested by witnesses. Thus, where in a mortgage-deed executed by A and B, it appeared that after the bond was signed by A in the presence of two persons who then and there attested the document, it was taken to B who lived at a different place, and that B signed the document in the presence of the witnesses who however did

not sign their names again as attesting witnesses, *held* that the bond was not properly attested so far as B was concerned—*Muniappa v. Vellaichami*, 1918 M.W.N. 853, 49 I.C. 278. But where a document consists of several sheets of paper and the executant signs each sheet, it is not necessary that every signature of the executant must be attested by the witnesses; it is sufficient if one signature is attested. A mortgage-deed consisted of three sheets of paper; the mortgagor signed the second sheet in the presence of the attesting witnesses who also signed at the foot as having witnessed the signature of the mortgagor. The third sheet (which enumerated certain additional properties included in the mortgage) was signed by the mortgagor in the presence of the same witnesses but without their again affixing their signatures. *Held* that the whole document was properly attested. To validate the third page of the mortgage-deed, it was not necessary for the two witnesses again to sign it—*Janki v. Aswini Kumar*, 60 I.C. 736 (Cal.).

The attesting witness must sign the deed *in the presence of the executant*. See the definition of 'attested' in sec. 3. Where it was proved that the executant signed the deed in the presence of the attesting witnesses, but there was no evidence that the latter signed the document in the presence of the executant, *held* that the deed was not validly attested—*Jadunandan v. Surajdeo*, 52 All. 434, 1930 A.L.J. 289, A.I.R. 1930 All. 223 (224). Where the witnesses did not see the executant sign the instrument and the executant did not acknowledge to them that she had signed it, and the attestors did not even sign the instrument in the presence of the executant, *held* that the deed was not validly attested—*Venkata Jagannatha v. Venkata Kumara*, 54 Mad. 163, A.I.R. 1931 Mad. 140 (141), 135 I.C. 17.

352. Who can attest:—A party to an instrument cannot under any circumstances be allowed to sign the instrument as an attesting witness; therefore a person who has once signed as an executant of a mortgage-deed and as one of the persons who were borrowing money on the bond, cannot be allowed to have his position altered from an executant of the bond to that of a witness, for the purpose of rendering the document valid as a mortgage against the other executants—*Debendra v. Behari*, 15 I.C. 666, 16 C.W.N. 1075; *Peary Mohan v. Sreenath*, 14 C.W.N. 1046; *Freshfield v. Reed*, (1842) 9 M. & W. 404; 60 R.R. 769; *Wickham v. Marquis of Bath*, (1865) L.R. 1 Eq. 17 (24). A person who is a party to the deed cannot be regarded as an attesting witness, on the ground that if the person for whose benefit the instrument is executed is allowed to be an attesting witness, the very object of attestation, *viz.*, the prevention of fraudulent malpractice, may be completely defeated—*Scal v. Claridge*, L.R. 7 Q.B.D. 516; *Amick v. Woodworth*, (1901) 58 Ohio 86; *Donovan v. St. Anthony Co.*, (1899) 73 Am. St. Rep. 779. But a person who is merely interested in the money advanced under the deed of mortgage, and is not himself a party to the deed, can validly attest it—*Balu v. Gopal*, 13 Bom.L.R. 944.

Attestation by scribe:—The question whether a scribe who has signed his name below the executant's can be regarded as an attestor is a question of fact depending upon the circumstances of each case. The mere statement of a writer of a document that he wrote it cannot be regarded as an attestation of that document by him—*Veerappudayan v. Muthu Karuppa*, 24 M.L.J. 534, 19 I.C. 589 (590). A scribe who had seen the

deed executed was held to be a valid attesting witness, though he called himself a scribe in the document—*Paramasiva v. Krishna*, 41 Mad. 535, 43 I.C. 983; *Jagannath v. Bajrang*, 48 Cal. 61, 62 I.C. 97; *V. R. Firm v. Md. Kassim*, 5 Bur.L.J. 68, A.I.R. 1926 Rang. 145; *Dharmadas v. Ramoomal*, 19 S.L.R. 322, A.I.R. 1927 Sind 118 (120). The writer of a document who signs just below or above the signature of an admitted attester or among a lot of signatures of attesting witnesses is deemed to sign as an attester, though he merely describes himself as the writer—*Ayyasami v. Kylasam*, 26 I.C. 409 (Mad.); *Jogendra v. Netai*, 7 C.W.N. 384 (386); *Abinash v. Dasarath*, 56 Cal. 598, 32 C.W.N. 1228 (1231). But in all such cases, it must be shown that he put down his name with the intention of attesting it. If such intention is established, he will be deemed as an attesting witness, inspite of the fact that he merely signed as a scribe—*Badri Prosad v. Abdul Karim*, 35 All. 254; *Veerappudayan v. Muthukaruppa*, 24 M.L.J. 534, 19 I.C. 589 (590). Such intention may be presumed when the scribe signs his name at the time of execution of the deed; and it is not necessary that the writer should expressly describe himself as a witness or that there should be a testimonial clause—*Veerappudayan v. Muthukaruppa*, 24 M.L.J. 534, 19 I.C. 589 (590); *Bryan v. White*, 2 Rob. Eccl. 315; *Burdett v. Spilsbury*, 10 Cl. & F. 340. But several other cases have laid down a more stringent rule, namely, that the writer of a document, in order to be an attesting witness, must sign as a witness (i.e., must describe himself as a witness). If his signature appears on the document merely as a scribe, it will not be sufficient to make him an attesting witness, even though he was present at the time of the execution and had seen the execution—*Ram Bahadur v. Ajodhya*, 1 P.L.J. 129, 20 C.W.N. 699, 34 I.C. 370; *Dalichand v. Lotu Sakhamam*, 44 Bom. 405, 55 I.C. 616; *Jadunandan v. Surajdeo*, 52 All. 434, 28 A.L.J. 289, A.I.R. 1930 All. 223; *Ram Samujh v. Mainath*, 2 O.W.N. 853, A.I.R. 1925 Oudh 737 (738) (following 1 P.L.J. 129); *Dharmadas v. Ramoomal*, 19 S.L.R. 322, A.I.R. 1927 Sind 118 (120). Where the name of the scribe appeared under a separate heading "scribe," apart from the signature of the only other person who signed as witness, held that the signature of the scribe was not, as a matter of construction, capable of being read as attestation—*Abinash v. Dasarath*, 56 Cal. 598, 32 C.W.N. 1228 (1231), 114 I.C. 84, A.I.R. 1929 Cal. 123. If a person who has signed as a scribe subsequently asserts that he signed as a witness, the onus of proving such assertion lies very heavily upon him—*Nageshwar Prosad v. Bachu Singh*, 4 P.L.J. 511.

The scribe of a mortgage-deed who executes the document for and on behalf of the mortgagor is not competent to sign the document as an attester; for that will amount to attestation of one's own signature, which is invalid—*Rajani v. Panchananda*, 23 C.W.N. 290, 48 I.C. 720; *Upendra v. Hukum Chand*, 46 Cal. 522; *Shristidhar v. Rakshakaly*, 49 Cal. 438.

353. Attestation of signature is not necessary:—See the new definition of "attested" in sec. 3 ante, particularly the words "or has received from the executant a personal acknowledgment of his signature." Prior to this definition it was held by the High Courts as well as by the Privy Council that it was necessary, to validate a mortgage under this section, that the mortgagor must sign the document in the presence of the attesting witnesses. There was no attestation unless the act of signing by the person who executed the document was done in the presence of the

witnesses. The thing should be done in the presence of the man who in future would be able to testify that it was done. A mere acknowledgment of his signature by the executant in the presence of the witnesses was not sufficient—*Shamu Pattar v. Abdul Kadir*, 31 Mad. 215, affirmed by the Privy Council in 35 Mad. 607; *Sarkar Barnard & Co. v. Alak Manjari*, 83 I.C. 170 (P.C.), A.I.R. 1925 P.C. 89; *Hira Bibi v. Ram Hari*, 5 Pat. 58 (P.C.), A.I.R. 1925 P.C. 203; *Arjunchandra v. Kailash Chandra*, 27 C.W.N. 263; *Radhe Shiam v. Chunni*, 14 A.L.J. 361, 35 I.C. 192; *Sama Rao v. Vannajee*, 46 Mad. 64 (71); *Abdul Karim v. Saliman*, 27 Cal. 190; *Girindra v. Bijoy Gopal*, 26 Cal. 246; *Khemchand v. Malloo*, 10 N.L.R. 81; *Prihudas v. Sahib Khan*, 18 S.L.R. 282; *Paramasiva v. Krishna*, 41 Mad. 535; *Ranu Shivaji v. Laxmanrao*, 33 Bom. 44; *Badri Prosad v. Abdul Karim*, 35 All. 254; *Sahedha v. Raja Ram*, 11 A.L.J. 757. These decisions are no longer of any authority in the face of the new definition of 'attestation' in sec. 3.

Prior to the decision of the Privy Council in 35 Mad. 607, it was held in several cases that it was not necessary for the mortgagor to affix his signature to the mortgage-deed in the actual presence of the attesting witnesses, but it was sufficient if he acknowledged his signature on the deed in their presence—*Sheikh Ghazi v. Bhawani Prasad*, 1896 A.W.N. 89; *Bunkatesh v. Rama Das*, 6 A.L.J. 737; *Ramji v. Bai Parbati*, 27 Bom. 91; *Ganga Devi v. Shiam Sunder*, 26 All. 69. These decisions will now stand as good law.

The new definition of attestation (which has been added by the T. P. Amendment Act XXVII of 1926) is *retrospective* in its operation, in view of the word "*must be deemed always to have meant*" occurring in the definition, which words have been added by the Amending and Repealing Act X of 1927. In other words, all documents executed even prior to the passing of the Act XXVII of 1926, in which the attesting witnesses did not actually see the executant sign the mortgage-deed but received from the executant a personal acknowledgment of his signature on the deed, and then attested the deed, must be nevertheless deemed to have been validly attested—*Balaji v. Gangamma*, 51 M.L.J. 641, A.I.R. 1927 Mad. 85, 99 I.C. 143; *Mohammedi v. Kashi*, A.I.R. 1926 All. 725, 96 I.C. 775; *Veerappa v. Subramanya*, 52 Mad. 123, 55 M.L.J. 594 (F.B.), 116 I.C. 367, A.I.R. 1929 Mad. 1; *Radha Mohan v. Nripendra*, 47 C.L.J. 118, A.I.R. 1928 Cal. 154, 31 C.W.N. clx; *Motilal v. Kasambhai*, 29 Bom. L.R. 1334, A.I.R. 1928 Bom. 16, 105 I.C. 864; *Gangaram v. Umaji*, 105 I.C. 891, A.I.R. 1928 Nag. 70. See page 18 *ante*. The contrary view taken in the Allahabad Full Bench case of *Girijanandan v. Hanumandas*, 49 All. 25, 24 A.L.J. 921, A.I.R. 1927 All. 1, 99 I.C. 161 must be deemed as overruled by the Amending and Repealing Act of 1927.

Where the attesting witness to a mortgage-deed signed the document *before* its execution by the mortgagor, *held* that the bond was not attested as required by this section—*Pran Nath v. Jadu Nath*, 32 Cal. 729.

Attestation by Registration officer:—A large number of cases hold to the view that the Registration endorsement made by the Sub-Registrar at the time of registration of the mortgage-deed amounts to an attestation, so that if there is only one witness to the deed, instead of two, the defect is made up by the Sub-Registrar's signature—*Veerappa v. Subramanya*, 52 Mad. 123 (F.B.); *Radha Mohan v. Nripendra*, 47 C.L.J. 118; *Ram Charan v. Bhairon*, 53 All. 1; *Saroda v. Triguna*, 1 Pat. 300. But the

Oudh Chief Court has dissented from this view on the ground that the word 'attestation' is used to mean a certain act with *reference to the execution* of the document, and with the *intention* of witnessing the executant's signatures, whereas the signature of the Sub-Registrar is put to the registration endorsement after the execution of the document has been complete, and he puts his signature not with the intention of witnessing the executant's signature, but with a different object and for a different purpose altogether — *Chandrani v. Lala Sheo Nath*, 8 O.W.N. 194, A.I.R. 1931 Oudh 146 (150), 132 I.C. 337. A similar view has been taken by the Allahabad High Court in *Lachman v. Surendra*, 1932 A.L.J. 653 (F.B.), 139 I.C. 1, A.I.R. 1932 All. 527.

354. Attestation of mortgage executed by pardanashin lady:—

Where *pardanashin* ladies are unable to appear before male witnesses, a document, which by independent testimony is proved to have been executed by a *pardanashin* lady, may reasonably be deemed to have been attested by witnesses, if they were present outside the *pardah* and had before attestation satisfied themselves that there was no fraud and that the deed had been actually executed by the lady. The fact that a screen had completely separated the witnesses from the executant would not invalidate the attestation—*Sarur Jigar v. Barada Kanta*, 37 Cal. 526; *Harmangal v. Ganaur*, 13 C.W.N. 40. (In both these cases, one of the attesting witnesses managed to see the lady sign, from outside the *pardah*). Though this is not a strict compliance with the letter of the law, still it is the only possible mode of attestation under the circumstances, having regard to the custom of this country. These two cases may be compared with an English case in which Sir H. Jenner Fust expressed the opinion that he would be prepared to hold that if the attester and the executant signed in the presence of each other, it would be a valid attestation, though one of them being blind could not see, provided his position was such that he could have seen if he had his eyesight unimpaired!—*Re Piercey*, 1 Robertson 278, cited in *Sarur Jigar v. Barada Kanta*, 37 Cal. 526. A mortgage executed by a *pardanashin* lady was attested by her husband and another witness. The husband actually saw the signature being made and the other witness was outside the screen in the same room with the lady and he knew her voice and heard her say "yes" when the document was explained to her. *Held* that the document was duly attested—*Rukmini v. Nilmani*, 19 C.W.N. 1309; *Syed Yakir v. Madhusudan*, 45 I.C. 691 (Pat.). It is not essential that the attesting witnesses should have actually seen the lady sign the document—*Kasidanbi v. Ganga*, 16 N.L.R. 196, 56 I.C. 247. It is not necessary in the case of a document executed by a *pardanashin* lady, that the witnesses should be actually inside the *pardah*. Where one of the witnesses to a mortgage-deed was inside the *pardah* where the lady affixed her signature to the deed, the other witnesses being outside the *pardah*, and after the lady's signature he took the document to the other witnesses, and there he signed it himself and the other witnesses also signed, *held* that there was valid attestation—*Syed Yakir v. Madhusudan*, 45 I.C. 691 (Pat.). Where the witnesses who attested the execution of a mortgage deed by a *pardanashin* lady had not seen her face, but had identified her by her voice, *held* that the execution of the mortgage-deed was sufficiently attested—*Padarath Halwai v. Ram Narain*, 37 All. 474 (P.C.); *Rai Radha Kishen v. Jag Sahu*, 60 I.C. 173 (Pat.). But where the witnesses did neither see the face of the

executant *pardanashin* lady nor hear her voice, the deed was not validly attested. Thus, a mortgage-deed, purporting to have been granted by a *pardanashin* lady on behalf of her minor son, was executed as follows: the lady was behind the *pardah*, when the document was taken to her for signature; none of the witnesses saw her sign it; her son came from behind the *pardah*, and said that it had been signed by her, and then the witnesses attested it. Their Lordships of the Judicial Committee observed that the requirement as to attestation contained in sec. 59 was not complied with, since the attesting witnesses were neither able to answer as to the act of execution nor as to the identity of the person performing the act—*Ganga Pershad v. Ishri Pershad*, 45 Cal. 748 (754) (P.C.), 22 C.W.N. 697, 45 I.C. 1. The same view is taken in *Hira Bibi v. Ram Hari*, 5 Pat. 58 (P.C.), 89 I.C. 659, A.I.R. 1925 P.C. 203, where the facts are exactly the same. Even the fact that the *pardanashin* lady subsequently admitted that she had executed the mortgage-deed would not validate the deed by operation of sec. 70 of the Evidence Act, for that section applies only to a document *validly attested*, which is not the case here—*Hira Bibi v. Ram Hari*, (supra). Where the attestors did not see the lady sign the instrument, and the lady did not acknowledge to them that she had signed it, and the attestors did not sign the instrument in the presence of the lady (as for instance, where the witnesses were waiting in the parlour of the lady's house and the document was taken inside the house for her signature, and after its return with her signature it was brought to the place where the witnesses were waiting and there they signed), the instrument could not be said to have been validly attested—*Venkata Jagannadha v. Venkata Kumara*, 54 Mad. 163, 60 M.L.J. 56, A.I.R. 1931 Mad. 140 (141), 135 I.C. 17.

355. Effect of invalid attestation:—If a document is not validly attested as required by this section the mortgage is ineffectual, but it does not follow that, failing to operate as a mortgage, it will still operate as a charge. The Legislature could not have intended that a transaction bad as a mortgage (because the document was not registered or attested) was still good as a charge under sec. 100, for then the owner of that charge could afford to disregard sec. 59 altogether, being amply protected by sec. 100—*Pran Nath v. Jadu Nath*, 32 Cal. 729; *Samoo Patter v. Abdul Sammad*, 31 Mad. 337; *Shama Pattar v. Abdul Kader*, 35 Mad. 607 (P.C.); *Narayan v. Lakshmandas*, 7 Bom.L.R. 934; *Debendra v. Behari Lal*, 16 C.W.N. 1075, 15 I.C. 666; *Collector of Mirzapur v. Bhagwan Prasad*, 35 All. 164, 18 I.C. 311; *Ram Narain v. Adhindra Nath*, 44 Cal. 388 (P.C.); *Khem Chand v. Malloo*, 10 N.L.R. 81, 26 I.C. 601.

But though the deed may be ineffectual as a mortgage for want of attestation, still it will be admissible as an evidence of a *personal covenant* to repay the debt, whether the deed has been registered or not—*Muthalakulangara v. Thiruthipalli*, 32 Mad. 410 (F.B.); *Sada Kavaur v. Tadepally*, 30 Mad. 284; *Venkata Jagannadha v. Venkata Kumara*, 54 Mad. 163, A.I.R. 1931 Mad. 140; and a simple money decree can be passed on the personal covenant to pay—*Mahadeo Prosad v. Gajraj Sing*, 3 O.L.J. 164, 34 I.C. 397; *Mathura Prosad v. Chedi Lal*, 13 A.L.J. 553; *Sama Rao v. Vannajee*, 46 Mad. 64 (67); *Dhana Mohammad v. Nastulla*, A.I.R. 1926 Cal. 637; *Tofaluddi v. Mehar Ali*, 26 Cal. 78. So, in a suit on a simple mortgage for sale of the mortgaged property, if it is found that the document fails for want of proper attestation to take effect as a

mortgage deed, the Court can allow the plaintiff, even at a late stage of the case, to amend the plaint by adding an alternative payer for a simple money-decree—*Mahadeo Prosad v. Gajraj*, 3 O.L.J. 164. But this rule will not hold good in the case of a usufructuary mortgage in which the mortgagor does not bind himself personally to repay the money. If such mortgage is not validly attested, neither a personal decree will be allowed against the mortgagor nor will the document create a charge—*Ram Narain v. Adhindra Nath*, 44 Cal. 388 (P.C.).

356. Equitable mortgage:—The last para of the old section which provided for an equitable mortgage was not happily worded: it was in the nature of a negative provision. It gave rise to the contention (in a case before the Privy Council) that this para did not validate or expressly recognize an equitable mortgage but threw on those who relied on it to establish the validity of such mortgage, and that if the mortgagee did not discharge that burden, the mortgage was invalid. But their Lordships overruled this contention, saying that although this Act did not itself validate such mortgages, the validity of such mortgages must be deemed as recognized by this Act, and that no onus lay on the mortgagee to prove the validity of the mortgage—*Papiah Naidu v. Naganatha Sethupathi*, 61 M.L.J. 408 (P.C.), 35 C.W.N. 1061 (1065), A.I.R. 1931 P.C. 239, 134 I.C. 328.

No such contention is now possible under clause (f) of sec. 58, to which this para has been transferred.

An equitable mortgage may be made without any writing, because it is the deposit of title-deeds which creates the mortgage; the mortgage is effected as soon as the deposit takes place, and any letter or memorandum which accompanies or follows the deposit is merely a recital that the mortgage has been effected, and is not itself a contract of mortgage—*Kedarnath v. Shamlal*, 11 B.L.R. 405; *Jivandas v. Framji*, 7 B.H. C.R. 62; *Behram v. Sorabji*, 38 Bom. 372, 23 I.C. 140 (141); *Oo Noun v. Mounq*, 13 Cal. 322 (325).

As regards registration, the newly added words "*other than a mortgage by deposit of title-deeds*" show that such a mortgage, whatever be the amount of the loan, does not require registration.

An equitable mortgage is created and is complete by the act of deposit of title-deeds; nothing else is necessary. It is essentially an oral transaction; consequently no writing is required, and registration is out of the question. But if there is a writing, the matter is different. In such a case, a distinction should be made between cases in which the writing itself constitutes the bargain between the parties, and cases in which the writing is a mere memorandum of the fact of mortgage. In the former case, registration is essential; in the latter, registration is unnecessary. Therefore, in determining whether the writing requires registration or not, it is necessary to consider, whether the writing is the embodiment of the equitable mortgage or whether the mortgage is complete independently of it. Thus, a letter or memorandum which is written after the deposit has been made and which records the deposit and the purpose for which it has been made, does not require registration, because such a document does not constitute the bargain between the parties; the mortgage has been effected by deposit before the writing of the letter; and the letter is merely the record of a transaction which has already been com-

pleted—*Bhuban Mohan v. Co-operative Hindustan Bank*, 29 C.W.N. 784, A.I.R. 1925 Cal. 973 (975), 88 I.C. 866; *Kshetranath v. Harasukhdas*, 31 C.W.N. 703, A.I.R. 1927 Cal. 538; *Sundarachariar v. Narayana*, 54 Mad. 257 (P.C.), 35 C.W.N. 494 (501), A.I.R. 1931 P.C. 36, 131 I.C. 328; *Surendra v. Mohendra*, 59 Cal. 781, 36 C.W.N. 420, A.I.R. 1932 Cal. 589; *Kedarnath v. Shamlal*, 11 B.L.R. 405 (412), 20 W.R. 150; *Esther v. Martu*, 37 I.C. 117, 25 C.L.J. 160; *Oo Nounng v. Mounng*, 13 Cal. 322 (325); *Ma Sein v. Chetty Firm*, 3 Rang. 443; *Gokul Das v. Eastern Mortgage Agency Co.*, 33 Cal. 410 (420); *Haripado v. Anath Nath*, 22 C.W.N. 758 (760), 44 I.C. 211; *Vadamalai v. Subramania*, 1923 M.W.N. 57, A.I.R. 1923 Mad. 262; *Rammohan v. Bharat National Bank*, 3 Lah.L.J. 373; *Umrao Singh v. Punjab National Bank*, 3 Lah.L.J. 44, 59 I.C. 578. It is the deposit of title deeds that create an equitable mortgage; that is, the essence of an equitable mortgage is the deposit of title-deeds, and a letter which accompanies or precedes or is contemporaneous with the deposit does not *per se* have the effect of creating the mortgage merely because it contains the terms of the contract—*Muthiya Chetty v. Kothandaramaswami*, 31 M.L.J. 347, 35 I.C. 864 (865, 866). But when a document is drawn up constituting the bargain between the parties,—a document which purports or operates to create the mortgage, which is tacitly considered by the parties themselves as the only repository and appropriate evidence of the agreement, a document without production of which in evidence the plaintiff cannot establish his claim—then the document is not admissible in evidence to prove the mortgage unless it is registered—*Subramonian v. Lutchman*, 50 Cal. 338 (346) (P.C.); *Bengal Banking Corporation v. Mackertich*, 10 Cal. 315 (322); *Chunilal v. Vithal Das*, 24 Bom.L.R. 502, A.I.R. 1922 Bom. 440; *National Bank of India v. Nazir & Co.*, 34 Bom.L.R. 748, 139 I.C. 745, A.I.R. 1932 Bom. 401 (404); *Krishnaiya v. Ponnuswami*, 47 Mad. 398 (400), 46 M.L.J. 295, A.I.R. 1924 Mad. 547; *Dwarka v. Sarat Kumari*, 7 B.L.R. O.C. 55; *Bhairab Chandra v. Anath Nath*, 24 C.W.N. 599, 31 C.L.J. 375; *Behram v. Sorabji*, 38 Bom. 372, 23 I.C. 140 (141); *Swami Chetty v. Ethirajulu*, 40 Mad. 547, (1916) 2 M.W.N. 84, 34 I.C. 853; *Alwar Chetty v. Jagannath*, 54 M.L.J. 109; *Jagannadham v. Official Assignee*, 60 M.L.J. 309, A.I.R. 1931 Mad. 124 (127, 128), 129 I.C. 814.

A mere agreement to make an equitable mortgage does not require registration and is admissible in evidence though unregistered—*Bengal Banking Corporation v. Mackertich*, 10 Cal. 315 (322).

59A. Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them.

This section has been added by sec. 21 of the Transfer of Property Amendment Act (XX of 1929). The *Special Committee* observes:—

“Whether the words ‘mortgagor’ and ‘mortgagee’, as used in the different sections in this Chapter, include all persons deriving title from them has given rise to some difficulties. (See 39 I.A. 7, 34 All. 63 (P.C.); and 21 All. 223). In order to make this clear, we propose the addition of section 59A.”

357. The term “mortgagee” in sections 60 and 62 is intended to mean not only the mortgagee but persons deriving title from him. These sections do not limit the right of the mortgagor to proceed only against the mortgagee in a redemption-suit. In order to avoid multiplicity of proceedings the Court is not debarred from giving a decree in a redemption suit against the persons who have derived title from the mortgagee (*e.g.*, a sub-mortgagee)—*Venkataramana v. Rangaswami*, 1927 M.W.N. 418, A.I.R. 1927 Mad. 703 (704).

Rights and Liabilities of Mortgagor.

60. At any time after the principal money has become *due*, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed *and all documents relating to the mortgaged property which are in the possession or power of the mortgagee*, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor, either to retransfer the mortgaged property to him, or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties, or by *decree* of a Court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass, or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except *only* where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

Amendment:—By section 22 of the T. P. Amendment Act (XX of 1929), the word “payable” has been replaced by the word “due” (see Note 359), and the italicised words have been added in para 1 (see Note

370); the word "decree" has been substituted for "order" in para 2 (see Note 373); and the word "only" has been added in the last para (see Note 376).

359. "Due"—When mortgagor may redeem:—"The general principle as to redemption and foreclosure is that in the absence of any stipulation, express or implied, to the contrary, *the right to redeem and the right to foreclose are co-extensive*, and that where there is a stipulation to pay a mortgage-debt within (e.g.) ten years, the mortgagor cannot redeem at an earlier date. Having regard to sec. 60 of the Transfer of Property Act, the Legislature appears to have adopted the principle that in the absence of a stipulation to the contrary, the presumption is that the right to redeem and the right to foreclose arise at the same time, and that when a date is fixed for the payment of the principal-debt and the mortgagee cannot foreclose earlier, the mortgagor also cannot redeem before the appointed time"—*Tirugnana v. Nallatombi*, 16 Mad. 486 (489). Thus, if the mortgage-deed fixes a term of years (e.g., where the deed stipulates that the mortgagor will pay the debt within 10 years or 15 years and redeem the property), the mortgagor is not entitled to redeem before the expiry of the term. The mere use of the word "within" ("within 10 years") is not a sufficient indication of an intention that the mortgagor may redeem in a less period than 10 years—*Vadju v. Vadju*, 5 Bom. 22; *Shiam Lal v. Jagadamba*, 25 A.L.J. 1051, A.I.R. 1928 All. 131 (132, 133); *Raghubar v. Budhu Lal*, 8 All. 95 (98). This principle has been recognised in *Husaini v. Husain*, 29 All. 471 (473), and has been ultimately approved of by the Privy Council: "Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period"—*Bakhtawar v. Husaini*, 36 All. 195 (199) (P.C.).

✓ In an earlier Madras case Turner, C.J. expressed the opinion that where a date was fixed in the mortgage deed the presumption was that the date was fixed for the convenience of the mortgagor, and that he might repay the debt at an *earlier* period—*Sri Raja Satrucherla v. Sri Raja Vairicherla*, 2 Mad. 314 (316); and relying on this view, Mahmood, J. laid down that "no general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless the mortgagee succeeds in showing that by reason of the terms of the mortgage itself the mortgagor is then precluded from paying off the debt due by him to the mortgagee"—*Bhagwat v. Parshad*, 10 All. 602 (609). In a Madras case, where the mortgagor covenanted to repay the mortgage money within a specified date (e.g., within 20th April 1904), *held* that the mortgagor could redeem before that date, that the rule of mutuality (*viz.*, that the right of redemption and the right of foreclosure are co-extensive) was not an inflexible or universal one, and that when the mortgagor covenanted to repay the money within certain date, it must be presumed that he intended to reserve the liberty of redeeming at his pleasure—*Rose Ammal v. Rajarathnammal*, 23 Mad. 33 (35, 36), dissenting from *Tirugnana v. Nallatombi*, 16 Mad. 486.

But the Legislature has adopted the rule of mutuality, and the reason for substituting the word "due" for "payable" has been thus stated by the *Special Committee*:—

"The word 'payable' in section 60 at one time gave rise to a diversity of opinion. It was held in some cases that when a day was fixed for the payment of the debt secured by a mortgage and nothing more was stated, the presumption was that the day was fixed for the convenience of the debtor and that it was open to the mortgagor, if he liked, to pay the debt at an earlier date (I.L.R. 10 All. 602). A contrary view was taken in other cases and the general principle that the rights of redemption and foreclosure are co-extensive was strictly followed (I.L.R. 5 Bom. 22; 29 All. 471). In the last mentioned cases, where the deed provided that the mortgagor should pay 'within...years' the suit brought to redeem the property before the expiry of that period was held premature. There is nothing in law to prevent the parties from stipulating expressly that the mortgagor may discharge the debt within the specified period and take back the property, but it is an elementary proposition that the mortgagee is not entitled to foreclose before the mortgage-money has become due. As a corollary to that proposition it is reasonable to hold that a mortgagor also should not be allowed to redeem before the mortgage-money has become due. It is possible that a mortgagee, relying on the condition in a mortgage regarding the period of redemption, may have entered into other transactions which will be affected if the mortgage is redeemed before the period stipulated for redemption or foreclosure has expired. In *Bakhtawar Begum v. Husaini Khanum*, I.L.R. 36 All. 195, the Privy Council has approved of the view taken in I.L.R. 29 All. 471 that redemption should not be allowed within the term of the mortgage. In order to remove any doubt on this point, the word 'due' has been substituted for the word 'payable' in the first paragraph."

The diversity of opinion as to the meaning of the word "payable" (referred to in the above Report) is to be found in *Rose Ammal's* case (23 Mad. 33) and *Husaini's* case (29 All. 471). In the Madras case (at p. 36) it has been remarked that money is said to be "payable" when it is payable by the mortgagor, *i.e.*, when the mortgagor is entitled to pay it, even though it is not "due" to the mortgagee, *i.e.*, even though the mortgagee is not entitled to call for the money. The Allahabad High Court holds (at p. 474) that money becomes "payable" when the payment becomes obligatory upon the mortgagor, *i.e.*, when the mortgagee can enforce payment of it, and not earlier. To remove this divergence of opinion, the Legislature has substituted the word "payable" by the word "due", so that the mortgagor can redeem only when the money has become "due" to the mortgagee, *i.e.*, when the mortgagee can call for the money, and not earlier.

✓ But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor—*Bakhtawar v. Husaini*, 36 All. 195 (199) (P.C.); *Kuddi Lal v. Aisha*, 2 Luck. 564, A.I.R. 1927 Oudh 199 (201). Where in a usufructuary mortgage for 37 years, it was stipulated that if the mortgagor made payment of the amount due at the end of 10 years, he would be entitled to redeem, but if such payment was not made the mortgagee's possession was to continue on the same terms as before, and the mortgagor made no payment at the end of 10 years but brought a suit for redemption at the end of 14 years, *held* that the option to redeem at the end of 10 years not having been exercised on the proper date, the

suit brought before the expiry of the original term was premature—*Aga Mahammad v. Venkatappaya*, 35 M.L.J. 287, 48 I.C. 379 (382).

Where no time was fixed for the payment of the mortgage-money, but after the execution of the deed a clause was added to the effect that "the amount will be paid, principal and interest, within one year," and this clause was separately signed by the mortgagor, *held* under the circumstances of the case, that the mortgagor was entitled to redeem *before* the expiry of the year—*Purna Chandra v. Peary Mohan*, 39 Cal. 828 (833).

A mortgagor may sometimes be allowed to redeem before the fixed date on equitable grounds, *e.g.*, where the mortgagee failed to perform his part of the contract. In such a case, it is not equitable that the mortgagee should be in a position to resist redemption when he himself did not comply with the other terms of the deed—*Narasimha v. Seshayya*, 48 M.L.J. 363, A.I.R. 1925 Mad. 825, 90 I.C. 138; *Chhotku v. Baldeo*, 34 All. 659 (662).

A mortgagee may sometimes be allowed to sue before the expiry of the term on reasonable grounds (*e.g.*, in the event of the property being found to have been mortgaged or transferred to any one or if there should arise any cause which may effect the total or partial loss of the properties), but that does not give a corresponding right to the mortgagor to redeem before the stipulated period—*Bhawani v. Sheodihal*, 26 All. 479 (482). In a later Allahabad case, where the term of the mortgage was a long period, *viz.*, 40 years, the interest was payable annually, and it was stipulated that in case of default of payment of interest the mortgagee was entitled to sue at once for the entire mortgage-money, *held* that it was only equitable that the mortgagor also should be allowed to redeem before the expiry of the said period—*Hira Kuar v. Gambhir*, 19 A.L.J. 460, 62 I.C. 985 (986).

360. Usufructuary mortgage:—Where an instrument of mortgage provides for the mortgagee paying himself the debt from the rents and profits of the estate and for the surrender of possession when the debt is so paid off, the transaction is a *vivum vadium* in which no time is fixed for redemption, and the mortgage can be redeemed immediately after the discharge of the amount by means of the rents and profits from the property. In a usufructuary mortgage, the essence of the transaction is the realization of the principal and interest from the rents and profits of the mortgaged property, and as soon as the principal and interest have been satisfied, the mortgagor is entitled to redeem, irrespective of the fact that a time has been fixed in the mortgage-deed for the satisfaction of the mortgage. In such cases the time is not of the essence of the contract. Thus, if the usufructuary mortgage provides that the usufruct is to be applied first towards interest, then towards principal, and that the debt is to be repaid after a *certain numbers of years* (*e.g.*, 3 years) the mortgagor will be entitled to redeem *before* the date fixed, on his showing that the principal and interest had been wholly discharged by the usufruct before the stipulated period—*Kundan v. Thakurlal*, 6 C.P. L.R. 43. Where the deed provides that the mortgagee will be entitled to remain in possession for 12 years, even though the mortgage debt is satisfied out of the property before the expiry of the term, *held* that the mortgagor will be entitled to redeem before 12 years, as soon as the mortgage debt is satisfied—*Ankinadu v. Subbiah*, 35 Mad. 744 (748). See Notes 382 and 383 under sec. 62, where this subject is fully discussed.

In a usufructuary mortgage of agricultural land it is usually stipulated that if the mortgagor wants to redeem, he must redeem in a particular month (*e.g.*, Jeth) of the year. In such case, it has been held that having regard to the agricultural conditions of the country, the time of payment is of the essence of the contract, and that the mortgagor will not be entitled to redeem in any other month. The reason is thus stated: "In the case of a usufructuary mortgage like this one, it is necessary for the mortgagee who is liable to be redeemed to know *before he commences to sow his crops* whether he will have to give up possession in that year or not, and that no doubt is the reason for the stipulation that the redemption should take place in Jeth"—*Bansi v. Girdhar*, 1894 A.W.N. 143; *Chinnasamy v. Krishna*, 16 M.L.J. 146; *Muhammad Ali v. Baldeo Pande*, 38 All. 148; *Narsingh v. Achhaibar*, 36 All. 36; *Kirpal v. Sheoambar*, 1930 A.L.J. 610, A.I.R. 1930 All. 283 (285), 126 I.C. 366; *Sarbdawan v. Bijai*, 36 All. 551 (554). In such cases, the redemption decree, even though it directs the mortgagor to pay the mortgage-money in any other month, at the same time allows the mortgagee to retain possession till the next Jeth—*Narsingh v. Achhaibar*, 36 All. 36 (39); *Het Singh v. Bihari*, 43 All. 95 (101); *Kirpal v. Sheoambar*, *supra*.

361. Clog on redemption:—The right of redemption of the mortgagor has been the subject of anxious protection in law; so much so that an impediment to the fair exercise of that right (*i.e.*, a clog on the equity of redemption) even by a contract of the parties at the time of the transaction is not recognized. The Indian Legislature, in section 60 of the T. P. Act, has omitted the words "in the absence of a contract to the contrary" with a view to prevent the mortgagor from contracting himself out of his right of redemption at the time of the mortgage—*Seeti Kutti v. Kunhi Pathumma*, 40 Mad. 1040 (1062). This section is unqualified in its terms and contains no saving provision as other sections do, in favour of "contracts to the contrary." Therefore, there is no sufficient reason for withholding from the words of this section their full force and effect—*Muhammad Sher Khan v. Raja Seth Swami Dayal*, 44 All. 185 (189) (P.C.).

A mortgagor cannot by any contract entered into with the mortgagee at the time, give up his right of redemption or fetter it in any manner by confining it to a particular time or a particular manner or a particular description of persons—*Sayad Abdul Hak v. Gulam*, 20 Bom. 677 (696); *Kanaran v. Kuttoly*, 21 Mad. 110; *Rajmal v. Shivaji*, 27 Bom. 154; *Abdul Hakim v. Sajjad Hosain*, 26 O.C. 209, A.I.R. 1923 Oudh 209, 74 I.C. 304.

The doctrine of the Court of Equity on this subject is expressed in the well-known maxim "*Once a mortgage, always a mortgage*," which has been supplemented by the words "*and nothing but a mortgage*" by Lord Davey in the leading case of *Noakes v. Rice* [1902] A.C. 24. "This doctrine means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction or in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid and is inconsistent with the transaction being a mortgage."—*per Lord Lindley in Samuel v. Jarra Timber and Wood-paving Corporation*, [1904] A.C. 323. "The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the

discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which security was given is what is meant by 'clog' or fetter on the equity of redemption and is void."—*per* Lord Lindley in *Stanley v. White*, [1899] 2 Ch. 274. "Redemption is of the very nature and essence of a mortgage. It is inherent in the thing itself. Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security."—*per* Lord Macnaghten in *Noakes v. Rice*, [1902] A.C. 24 (30).

The doctrine of clog on redemption relates only to the dealings which take place between the parties to the mortgage *at the time* when the contract of mortgage is entered into, and therefore they are at liberty to deal *subsequently* with each other so as to vary the terms upon which the redemption of the mortgage can be had—*Harihar v. Bhawani*, 20 O.C. 97; *Parmanand v. Matadin*, 47 All. 582, 23 A.L.J. 307, A.I.R. 1925 All. 427; *Shankar Din v. Gokal Prosad*, 34 All. 620 (P.C.); *Shankar Dhonde v. Yeshwant*, 22 Bom.L.R. 965. The mortgagee cannot, at the moment when he is lending the money and taking the security, enter into an agreement, the effect of which would be that the mortgagor should have no right of redemption; but there is nothing to prevent that being done by an agreement which in substance and in fact is *subsequent* to and independent of the original bargain—*Lisle v. Reeve*, [1902] 1 Ch. 53. But the subsequent contract restricting the right of redemption must be an *independent* contract, *distinct* from the contract of mortgage. Otherwise it will be treated as a clog on redemption. The mere fact that the subsequent agreement was entered into 5 or 6 days after the contract of mortgage was executed, is not sufficient to show that it was an independent contract, if in fact the contract of mortgage and the subsequent agreement were parts of the *same transaction*. "The question is, in my opinion, not whether the two contracts were made at the same time and evidenced by the same instrument, but whether they were in substance single and undivided contracts, or two distinct contracts. The question is one not of form but of substance, and it can be answered in each case by looking at all the circumstances, and not by mere reliance on some abstract principle"—*per* Viscount Haldane in *Krelinger v. New Patagonia Meat Co.*, [1914] A.C. 25 (30); 83 L.J. Ch. 79; *Browne v. Ryn*, [1901] 2 Ir. R. 653; *Tirumala v. Srinivasa*, 52 Mad. 300, A.I.R. 1929 Mad. 243 (248), 56 M.L.J. 318, 121 I.C. 753.

A covenant amounting to a clog on redemption has no binding force either on the mortgagor or on *his assigns*—*Mehrban v. Makhna*, 11 Lah. 251 (P.C.), 34 C.W.N. 529 (534), 32 Bom.L.R. 882, 28 A.L.J. 544, 58 M.L.J. 714, A.I.R. 1930 P.C. 142, 123 I.C. 554.

An agreement which amounts to a clog on the equity of redemption cannot be enforced, even though it is contained in a consent-decree. In passing a consent-decree, the Court simply embodies in the decree the terms of the compromise, without any adjudication or an enquiry. In these

circumstances, the fact that an illegal term in an agreement is by consent of parties embodied in a consent-decree cannot make that term enforceable, nor can it be a defence in a subsequent suit for redemption—*Ambu v. Kelu*, 53 Mad. 805, 31 L.W. 44, A.I.R. 1930 Mad. 305 (314), 123 I.C. 584.

Application of the rule:—The rules as to clog on redemption apply not only to the classes of mortgages defined in sec. 58, but also to a mortgage which is a combination of a simple and a usufructuary mortgage—*Pandiyar v. Vellayappa*, 33 M.L.J. 316, 42 I.C. 438; *Srinivasa v. Radha Krishna*, 38 Mad. 667; *Kandula Venkiah v. Donga Pillai*, 43 Mad. 589 (598, 604), 57 I.C. 274. The doctrine applies to an *anomalous* mortgage. See *Muhammed Sher Khan v. Rajah Seth Swami Dayal*, 44 All. 185 (189) (P.C.) cited in notes under sec. 98 *infra*; and *Chellakutti v. Vengappa*, A.I.R. 1925 Mad. 366, 82 I.C. 809.

Even in those parts of India to which the Transfer of Property Act has not been extended, the rule enunciated in section 60 would be applicable as a rule of justice, equity and good conscience, and clauses which take away the right of the mortgagor to redeem after the stipulated period would be deemed as clog on the equity of redemption and as such not enforceable—*Ma Min Byu v. Maung Chit Po*, 1 Rang. 419.

362. Instances of “clog on redemption”:

It is impossible to lay down a hard and fast rule as to what should and what should not be regarded as an improper restraint or fetter on the equity of redemption. The Court has to take into account all the circumstances as they existed at the time of execution of the mortgage, and all the terms of the mortgage-deed, and then consider whether the covenant is so unduly hard and unconscionable as to nullify for all practical purposes the right of redemption, or the exercise of the right of redemption is restricted in such an unreasonable manner as practically to deny it—*Bhullan v. Bachcha*, 53 All. 580, A.I.R. 1931 All. 380 (384), 131 I.C. 520; *Sarbdawan v. Bijai*, 36 All. 551 (554).

(1) An *agreement restricting the equity of redemption* to a specific period is a clog on redemption. Equity does not recognise agreements to confine the right of redemption to any given period, as the life of the mortgagor; or to any specific class of persons, as to the mortgagor alone or the heirs of his body. *Fisher on Mortgage*, § 1395; *Sayad Abdul Hak v. Gulam*, 20 Bom. 677 (696). Thus, where a suit on an usufructuary mortgage was compromised and a consent-decree was passed to the effect that if the amount due under the mortgage was paid within 3 years from the date of the decree, the mortgagor was to redeem the properties, that in default of such payment the mortgagee was to recover possession of the properties in execution of the decree, *held* that the provision in the consent-decree which allowed the mortgagor to take possession only by execution of the decree reduced the period of 60 years provided by the law of redemption (Art. 148, Limitation Act) to a period of 3 years and was invalid as being a clog on the equity of redemption—*Ambu v. Kelu*, 53 Mad. 805, A.I.R. 1930 Mad. 305 (312), 123 I.C. 584.

(2) A *condition restraining alienation during mortgage* is a clog on the equity of redemption. Thus, a stipulation that the mortgagor shall not alienate the property pending the mortgage and that he shall be allowed to redeem only by paying the money out of his own pocket and not by money raised by a sale or mortgage of the property, is inequitable

and incapable of enforcement—*Ram Saran v. Amrita Kuar*, 3 All. 369 (F.B.); *Ram Ganesh v. Rup Narain*, 80 I.C. 944, A.I.R. 1925 All. 34 (35); *Kirpal v. Sheoambar*, 1930 A.L.J. 610, 126 I.C. 366, A.I.R. 1930 All. 283 (285); *Kuddi Lal v. Aisha*, 2 Luck. 564, 102 I.C. 263, A.I.R. 1927 Oudh 199 (200). But see *Shiam Lal v. Jagdamba*, 25 A.L.J. 1051, A.I.R. 1928 All. 131 (134), 108 I.C. 561. So also, where a mortgagor undertook that he would not alienate the equity of redemption and that the mortgagee should not be obliged to receive the money from any one but the original mortgagor, it was held that as the undertaking absolutely forbade alienation, and thus deprived the mortgagor of a right which was an essential incident of the estate he had in the property by virtue of his equity of redemption, it could not be given effect to—*Trimbak v. Sakharam*, 16 Bom. 599. In mortgage-bonds in this country, a clause is generally inserted restraining alienation of the mortgaged property; such a clause does not prevent an alienation being made subject to the rights of the mortgagee—*Syam Peary v. Eastern Mortgage and Agency Co.*, 22 C.W.N. 226, 40 I.C. 865.

Similarly, a covenant that the mortgagor shall not be entitled to redeem the mortgage with borrowed money, cannot be enforced, as its effect is to throw an obstacle in the way of redemption—*Sarbdawan v. Bijai*, 36 All. 551 (555).

(3) *Onerous covenant extending beyond redemption*:—In a mortgage of a leasehold public house by a licensed victualler to brewers, the mortgagor covenanted with the mortgagees that he and all the persons deriving title under him should not, during the continuance of the term and whether any money should or should not be owing on the security of the mortgage, use or sell in the house any malt liquors except such as should be purchased from the mortgagees. *Held* that the words “whether any money should or should not be owing for the security of the mortgage” showed that the onerous covenant was to continue even after the mortgage had been paid off; such an agreement was void, because it prevented the mortgagor from getting back the property unfettered and unclogged even after he had paid off the principal and interest. Therefore, the mortgagor, on payment of all that was due upon the mortgage, was entitled to have a reconveyance of the property, from the tie—*Noakes v. Rice*, [1902] A.C. 24.

(4) *Agreement to convert mortgage into sale on default of payment*:—An agreement in a mortgage that in default of payment of the mortgage-money on the due date, the mortgagor will sell the property to the mortgagee at a price to be fixed by umpires, constitutes a fetter on the equity of redemption, and is therefore unenforceable—*Kanaram v. Kuttooly*, 21 Mad. 110. Similarly, a condition in the deed that the mortgage will work itself out into a sale (i.e. the mortgagee shall be absolute owner of the property) should the amount be not paid within a fixed period, is a clog on redemption and therefore void—*Mehrban v. Makhna*, 11 Lah. 251 (P.C.), 34 C.W.N. 529 (534), A.I.R. 1930 P.C. 142, 123 I.C. 554; *Srinivasa v. Radha Krishna*, 38 Mad. 667; *Gulab v. Pancham*, 59 I.C. 338 (Pat.); *Pandian v. Vellayappa*, 33 M.L.J. 316, 42 I.C. 438; *Athan Kutti v. Sutarjanom*, 32 M.L.J. 317, 37 I.C. 756; *Ram Ganesh v. Rup Narain*, A.I.R. 1925 All. 34, 80 I.C. 944; *Nga Po Nyun v. Mi Yin*, 11 Bur.L.T. 36, 39 I.C. 377; *Narayanamurthi v. Appalanarasimhulu*, 41 M.L.J. 563, A.I.R. 1921 Mad. 517, 68 I.C. 717; *Ram Bali v. Ram Asre*, 12 O.L.J. 105, 86 I.C. 686, A.I.R. 1925 Oudh 386. The principle has been thus stated in an

English case: "This Court as a Court of conscience is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule that a mortgagee can never provide, at the time of making the loan, for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them."—*per* Northington L. C. in *Vernon v. Bethell*, 2 Eden. 113.

But if this agreement is entered into not in the mortgage-deed itself but in a contract *subsequent* to the mortgage, it will not be invalid—*Kanhayalal v. Narhar*, 27 Bom. 297; *Shankar v. Yeshwant*, 22 Bom.L.R. 965. The rule is that the mortgagee cannot, *at the moment* when he is lending his money and taking his security, enter into an agreement the effect of which would be that the mortgagor should have no equity of redemption, but there is nothing to prevent that being done by an agreement which in substance and in fact is *subsequent* to and independent of the original bargain—*per* Vaughan Williams, L.J. in *Lisle v. Reeve*, [1902] 1 Ch. 53, affirmed by the House of Lords in *Reeve v. Lisle*, [1902] A.C. 461. The rule is thus stated in Halsbury's Laws of England, Vol 21, p. 143: "No agreement between a mortgagor and mortgagee contained in the mortgage can make a mortgage irredeemable; and no contract between a mortgagor and mortgagee made *at the time* of the mortgage and as part of the mortgage transaction, or in other words, as one of the terms of the loan, can be valid, if it provides that the mortgaged property shall become the absolute property of the mortgagee upon any event whatsoever." And at p. 140: "But the rule against clogging the equity of redemption does not invalidate *subsequent* and *independent* transactions between the mortgagor and mortgagee relating to the mortgaged property."

(5) *Covenant to grant permanent lease to mortgagee*:—A condition in a mortgage, that if the mortgagor redeems the property, the mortgage should be extinguished, but that the property should for ever remain in the possession of the mortgagee on his paying a fixed rent, is a condition which cannot be enforced. Such a condition, although it does not exclude the right of redemption, fetters it with the onerous obligation of accepting the mortgagee as a perpetual tenant, and prevents the mortgagor from getting back the property unfettered; it is therefore a clog on redemption—*Mahomed Muse v. Jijibhai*, 9 Bom. 524; *Bhimrao v. Sakharam*, 46 Bom. 409, 23 Bom.L.R. 1268; *Parmanand v. Mata Din*, 47 All. 582, 87 I.C. 477, A.I.R. 1925 All. 427; *Daolat Rai v. Sheikh Chand*, 11 N.L.R. 180; *Ram Narain v. Surath*, 5 P.L.J. 423, 57 I.C. 337; *Subrao v. Manjappa*, 16 Bom. 705 (707); *Sheo Singh v. Birbahadur*, 6 I.C. 707. And the law is the same whether the lease is granted at the time of the mortgage or *subsequently*—*Parashram v. Lakshmibai*, 53 Bom. 360, 31 Bom.L.R. 229, 115 I.C. 405, A.I.R. 1929 Bom. 186 (187); *Subrao v. Manjapa*, *supra*. In fact, such a covenant amounts to a covenant for selling the mortgaged property to the mortgagee. In point of fact, there is very little difference between a contract by the mortgagee to buy the mortgaged property out and out for a consideration, and a contract by a mortgagee to take a permanent lease at a fixed rent, which in effect makes him the owner of the mortgaged premises—*Bhimrao v. Sakharam*, 46 Bom. 409, 23 Bom.L.R. 1268.

(6) *Long leases to mortgagees at fixed rents*:—Similarly, long leases obtained by the mortgagees from their mortgagors at fixed rents are not allowed—*Morony v. O'Dea*, 1 Ball. & B. 109. Leases by a mortgagor to his mortgagee for a long period at an inadequate rent will not be upheld—*Hickes v. Cooke*, (1816) 4 Dow. 16. Indeed, in such cases, the determination of the question as to whether the rate of rent is fair or not is a matter of extreme difficulty. It is obvious that the parties are not able to deal upon equal terms, and the mortgagee by reason of his position tries to secure an advantage to himself. "Suppose the land, instead of being worth only £50 (the rent at which it was let to the mortgagee) was worth £60, and that £60 was offered for it by a third person; but the lease could not be made to that person without the concurrence of the mortgagee; and the mortgagee may say 'I will give only £50,' and thus by the power which his situation gives him, he prevails, without using a single word of threat, like the beggar in *Gil Blas* who with his gun on his shoulder extorted money from the traveller without uttering a word"—per Lord Redesdale in *Webb v. Rorke*, 2 Sch. & Lef. 661 (668). Dr. Ghose, however, is of opinion that a lease by the mortgagor to the mortgagee should not be set aside merely because it was of an improvident character, and that the above observation of Lord Redesdale should be confined to leases obtained by means of fraud. "It must also be remembered that an English mortgagee may harass the mortgagor in various ways which are not allowed in this country. There is thus very little similarity between the Indian mortgagee and the beggar in *Gil Blas* to whom Lord Redesdale alludes in *Webb v. Rorke*."—Ghose's *Law of Mortgage*, 5th Edn., p. 246.

(7) *Right of pre-emption given to mortgagee after redemption*:—If the mortgage-deed confers upon the mortgagee a right of pre-emption at a price fixed in the deed, to be exercised after the mortgagor redeems the mortgage, such a right would be "a clog upon redemption," for though such a stipulation does not bar a suit for redemption, yet it precludes the mortgagor from redeeming the mortgaged property in the same unfettered state in which he had held it when he mortgaged the property, inasmuch as after redemption he will have to hold it subject to a right of pre-emption which the mortgagee has secured under the instrument of mortgage. Such a collateral advantage bargained for by the mortgagee is really a clog upon the right of redemption—*Ramasami v. Chinnan Asari*, 24 Mad. 449 (458).

(8) *Covenant to pay interest in addition to usufruct*:—A covenant, in a usufructuary mortgage, to pay interest in addition to usufruct (especially in a case where the mortgagors are a pardanashin lady without independent advice and a boy of tender age without experience, and the mortgagee is the superior proprietor of the mortgagors) is hard and oppressive, and amounts to a clog on redemption—*Mahomed Ali v. Rakdan Ali*, 3 O.L.J. 746, 38 I.C. 454. So also, where the mortgagor is not entitled to rents and profits though he has to pay interest at 7½ per cent, and the mortgagees are entitled to spend any amount they like on improvements and charge the same on the property with interest at 6 per cent, the whole transaction is unconscionable—*Faujdar v. Abdul Samad*, 5 Lah. L.J. 394. But where the profits from the land being small, the mortgagee in possession was allowed to take the produce as well as to charge interest at 6 per cent. at the time of redemption, held that the terms of the mortgage were not unconscionably onerous—*Sarban v. Bhagwan*, 28 P.L.R.

59, A.I.R. 1926 Lah. 457; see also *Gokul v. Goitri*, 4 O.W.N. 147, A.I.R. 1927 Oudh 595 (596); *Ramkishore v. Ram Nandan*, 25 A.L.J. 1086, A.I.R. 1928 All. 99 (100); *Sarfaraz v. Udawat*, 4 Luck. 147, A.I.R. 1929 Oudh 30 (32), 113 I.C. 46.

(9) *Postponement of redemption for a long term*:—The right of redemption and the right of foreclosure are always co-extensive; and where the mortgage-deed expressly gives the mortgagee a power to call in his money at any time, any stipulation for postponement of redemption is unilateral and consequently invalid—*Sayad Abdul Hak v. Gulam Jilani*, 20 Bom. 677; *Sari v. Motiram*, 22 Bom. 375 (377); *Rahmat Ali v. Shadi Ram*, 28 P.L.R. 150, A.I.R. 1927 Lah. 226 (227). A covenant in a mortgage-deed postponing redemption *after the expiry of the period* fixed in the deed for redemption, amounts to a clog on redemption and is invalid. Thus, a mortgage-deed provided that the mortgagor was to redeem at the end of five years and that if he did not do so, the mortgagee was to have the option of taking possession for a period of 12 years, and that if the mortgagee took possession, the mortgagor was not to be entitled to redeem, till at the expiration of the 12 years. *Held* by the Privy Council that the mortgage being for a term of five years, the mortgagor had a right to redeem on payment of the mortgage-money on the expiration of the five years, and that the clause in the deed postponing redemption for the further period of 12 years was a clog on redemption and therefore invalid—*Muhammad Sher Khan v. Raja Seth Swami Dayal*, 44 All. 185 (189) (P.C.), 68 I.C. 853, A.I.R. 1922 P.C. 17. A covenant postponing redemption for a long term does not necessarily of itself amount to a clog on redemption. But where a mortgage was made for a very long term as 40 years, and a provision was inserted in the deed fixing a particular date on which it was to be redeemed, failing which the mortgage was to be renewed for another term of 40 years, *held* that the provision giving a right of redemption on one day only in 80 years was designed to make redemption almost impossible, and should not be enforced, and that the Court would allow redemption at any time on such terms as it thought fit.—*Sarbdawan Singh v. Bijai Singh*, 36 All. 551 (553), 12 A.L.J. 927, 24 I.C. 705; *Ram Ganesh v. Rup Narain*, A.I.R. 1925 All. 34, 80 I.C. 944; *Bhullan v. Bachcha*, 53 All. 580, A.I.R. 1931 All. 380, 131 I.C. 520; *Durga Singh v. Nawab Mirza Muhammad*, 17 O.C. 313, 25 I.C. 912; *Kunj Behari v. Prag Narain*, 9 O.L.J. 294, A.I.R. 1922 Oudh 283. See also the cases under Note 363 (2).

(10) Any covenant in the mortgage-deed conferring on the mortgagee *any interest in the property after redemption*, constitutes a clog on redemption. Thus, under a mortgage, the mortgagees were entitled to possession for 19 years. It was stipulated that if at the end of that period the mortgagor paid off the mortgage-money, the property was to belong, as to a limited interest therein only, to the mortgagor, and as to the major interest therein, to the mortgagees; if the mortgagor failed to pay-off the mortgage-money at the end of the 19 years, the property was to belong to the mortgagees absolutely. *Held* that the covenant was a clog on redemption and therefore void—*Mehrban v. Makhna*, 11 Lah. 251 (P.C.), 34 C.W.N. 529 (534), 32 Bom.L.R. 882, 28 A.L.J. 544, 58 M.L.J. 714, A.I.R. 1930 P.C. 142, 123 I.C. 554. Similarly, a stipulation that the mortgagee, even after the full payment of principal, interest and costs, should continue to receive for a definite or indefinite period a share

of the rents and profits of the mortgaged property, is void—*Noakes v. Rice*, [1902] A.C. 24 (31).

(11) An agreement in the mortgage-deed giving the mortgagee a right to purchase the mortgaged property at an inadequate price (*e.g.*, at 40 per cent. of its value) is void—*Samuel v. Jarrah Timber and Wood Paving Corporation, Ltd.*, [1904] A.C. 323.

So also, a stipulation in a mortgage-deed that the mortgagee shall be employed as a broker of the mortgagor-company, and that if the company's goods are sold otherwise than through the mortgagee, he should be paid the amount of commission he would have earned if the goods had been sold through him, is void—*Bradley v. Carrit*, [1903] A.C. 253.

363. What is not a "clog":—The mere fact that the terms of a mortgage are hard does not lead to the conclusion that they are to be considered as forming a clog on redemption. A man who enters into a transaction with his eyes open, and without any undue influence being brought to bear upon him, cannot ask to be relieved of the consequences of his action—*Nathu Ram v. Shadi Ram*, 40 P.W.R. 1919, 49 I.C. 946. See also *Aga Mahomed v. Venkatappaya*, 35 M.L.J. 287, 48 I.C. 379 (382). The following covenants have been held not to constitute any clog on redemption:—

(1) *Condition for redemption of prior mortgages:*—Where subsequent to the execution of a mortgage, the mortgagor executed a fresh mortgage for further advances, and in this subsequent mortgage he stipulated that the prior mortgage should not be redeemed until the principal and interest due under the subsequent mortgage had been paid, it was held that such a stipulation was not a clog on redemption, and the mortgagor must satisfy the subsequent mortgage before he could be allowed to redeem the earlier mortgage—*Sheo Kumar v. Fittu Singh*, 9 I.C. 52 (All.); *Ranjit Khan v. Ramdhan*, 31 All. 482; *Brij Lal v. Bhawani*, 32 All. 651; *Shibnarain v. Gajadhar*, 48 All. 292; *Chauharaja v. Ram Harakh*, 2 O.L.J. 601; *Naunidh Lal v. Mahadeo*, 25 O.C. 134; *Ram Charan v. Jagan*, 24 I.C. 737 (All.); *Gayadin v. Gajadhar*, 24 I.C. 611 (All.). So again, a covenant in a subsequent mortgage not to redeem that mortgage without redeeming at the same time a prior debt or mortgage, is not a clog on the equity of redemption but is a part and parcel of the subsequent contract, and the parties are bound by it—*Imam Baksh v. Anwari Begam*, 18 I.C. 718 (All.); *Abhai Narain v. Mata Prosad*, 24 O.C. 240, 64 I.C. 82; *Abdul Hamid v. Jairaj*, 3 A.L.J. 768; *Har Govind v. Tula Ram*, 10 I.C. 222 (All.); *Hari v. Vishnu*, 28 Bom. 349 (F.B.). This subject is more fully discussed in Note 378 under sec. 61.

(2) *Long term in usufructuary mortgage:*—A long term in a usufructuary mortgage does not necessarily amount to a clog on the equity of redemption. It is obvious that a long term in a usufructuary mortgage is less likely to operate as a clog on redemption than in any other class of mortgage, because redemption is effected on payment of a fixed sum and there is no danger of arrears of interest amounting up to an extent which may far exceed the value of the property—*Saiyid Zulfiqar v. Suraj Prasad*, 9 O.L.J. 365, A.I.R. 1922 Oudh 221. And so, the Courts have upheld a usufructuary mortgage which stipulated that the mortgagor should not be entitled to redeem until after the expiry of 15 years—*Lila v. Vasudev*, 11 B.H.C.R. 283; or 20 years—*Sarban v. Bhagwan*, 28 P.L.R. 59, A.I.R. 1926 Lah. 457; *Puran Singh v. Kesar Singh*, 39 P.R. 1907;

or 35 years—*Sarfaraz v. Udawat*, 4 Luck. 147, 113 I.C. 46, A.I.R. 1929 Oudh 30; *Dattawan v. Amardeo*, 12 A.L.J. 492; *Aga Muhammad v. Venkatappaya*, 35 M.L.J. 287; or 50 years—*Sundar Singh v. Hukam Singh*, 219 P.L.R. 1914; *Sayad Abdul Hak v. Gulam*, 20 Bom. 677; *Faujdar v. Abdul Samad*, 5 Lah.L.J. 394; *Milkhi v. Fattu*, 40 P.L.R. 1903; *Maiku v. Gayadin*, 57 I.C. 603; *Ram v. Jagrup*, 15 I.C. 880, 10 A.L.J. 157; or 60 years—*Ralla v. Amin Chand*, 126 P.R. 1908; *Ram Samujh v. Sheoraj*, 20 A.L.J. 607; or even 90 years—*Mahomed Ibrahim v. Mahomed*, 8 I.C. 1068, 1910 M.W.N. 792; *Baldeo v. Losai*, 4 Luck. 203, 5 O.W.N. 1091, 114 I.C. 811, A.I.R. 1929 Oudh 54; or 150 years—*Abdulla v. Sadulla*, 15 I.C. 917.

These provisions restraining redemption for a long period have been upheld on the ground that the Indian Limitation Act allows a very long period (*viz.*, 60 years) for suits for redemption, although the soundness of this ground has been doubted in *Sarbdawan v. Bijai*, 36 All. 551 (553). Still in such cases, the Courts should be guided by considerations of justice and equity. Where the effect of a covenant is to postpone redemption for an unduly long period, without any corresponding advantage to the mortgagor, or there are circumstances indicating that the covenant postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem, a Court may allow redemption irrespective of that term—*Durga Singh v. Nawab Mirza*, 17 O.C. 313, 25 I.C. 912; *Darghai v. Rafiqunnissa*, A.I.R. 1927 Oudh 237 (238); *Bachu v. Perbhu*, A.I.R. 1926 Oudh 356, 13 O.L.J. 476; *Abdul Hakim v. Sajjad Husain*, 26 O.C. 209, A.I.R. 1923 Oudh 209, 74 I.C. 304; *Raza Mahomed v. Ram Lal*, 12 O.L.J. 222, A.I.R. 1925 Oudh 406; *Kunj Behari v. Prag Narain*, 9 O.L.J. 294, A.I.R. 1922 Oudh 283; *Saiyed Zulfikar Ali v. Suraj Prasad*, 9 O.L.J. 365, A.I.R. 1922 Oudh 221; *Sohan Lal v. Kunwar*, 61 I.C. 962 (Oudh); *Madho Singh v. Lachhmi*, A.I.R. 1925 Oudh 720. This subject has been very fully discussed in *Balbhaddar v. Dhanpat Dayal*, 27 O.C. 4, A.I.R. 1924 Oudh 237. But it is impossible to lay down a hard and fast rule as to what should and what should not be regarded as an improper restraint or fetter on the right of redemption. The decision in each case must depend upon its own circumstances. The mere fact that the mortgage-deed contained a condition that in case the mortgage was not redeemed on the date on which the mortgage-period (20 years) expired, the mortgagor would not be able to redeem it for another period of 20 years, would not amount to a clog on the equity of redemption, in the absence of materials to show that there was a design to make redemption very difficult, if not impossible—*Narsingh Prasad v. Rupan Singh*, 1929 A.L.J. 606, 116 I.C. 876, A.I.R. 1929 All. 388 (389). Although the mortgage may be for a long period (*e.g.*, 35 years), still if there are no provisions in the mortgage-deed which are wholly advantageous to the mortgagee and do not confer any corresponding advantages on the mortgagor, there is no clog on redemption—*Sarfaraz v. Udawat*, 4 Luck. 147, 5 O.W.N. 974, 113 I.C. 46, A.I.R. 1929 Oudh 30 (31). But where a mortgage-deed contained onerous and one-sided covenants which operated to postpone the right of redemption for 60 years, while allowing the mortgagee to call for the mortgage-money at any time he liked, *held* that the covenant postponing redemption was unilateral and an unreasonable fetter on the equity of redemption and could not be enforced—*Lal Bahadur v. Zalim Singh*, 2 O.L.J. 1, 27 I.C. 581; *Sayad Abdul Hak v. Gulam Jilani*, 20

Bom. 677; *Sari v. Motiram*, 22 Bom. 375. A provision fixing a very long term in a usufructuary mortgage is not a ground for holding that the provision should not be enforced, but where a further provision has been inserted in the deed which makes redemption very difficult, if not impossible, at the end of that term, such a provision is a clog on redemption and cannot be enforced—*Sarbdawan v. Bijai*, 36 All. 551 (553), 12 A.L.J. 927, 24 I.C. 705. Where a usufructuary mortgage-deed provided that redemption should take place after 99 years on payment of double the amount of the principal money secured, *held* that the covenant created an unreasonable and oppressive fetter on the right to redeem, and the Court would allow redemption, irrespective of that term, on such condition as it may deem fit to impose—*Muthura Prosad v. Bhagwat Prosad*, 22 O.C. 191; *Abdul Hakim v. Sajjad Husain*, 26 O.C. 209, A.I.R. 1923 Oudh 209. A covenant postponing redemption for 200 years has been held to be a clog on redemption—*Fateh Mohammad v. Ram Dayal*, 2 Luck. 588, 4 O.W.N. 502, A.I.R. 1927 Oudh 224 (225).

(4) *Condition of pre-emption by the mortgagee*:—Speaking generally, a mortgagee is not allowed as such to avail himself of the necessities of his debtor so as to obtain a collateral or additional advantage beyond the payment of principal, interest and costs. (Coote on *Mortgage*, p. 15.) But if the covenant creating the collateral advantage is not objectionable on the ground of unfairness or unreasonableness, it will be enforced—*Bimal Jati v. Biranja*, 22 All. 238. Thus a mortgagee may stipulate for the collateral advantage of a right of pre-emption (if the mortgagor sells *within the period* of mortgage) at the *market value* of the day; and such a covenant is valid and enforceable, because the option of sale is still left with the mortgagor who may sell or redeem as he likes, the only stipulation being that in the event of his choosing to sell, he shall give the mortgagee the first refusal—*Ramasami v. Chinnan*, 24 Mad. 449 (459); *Matura Subba v. Surendra*, 8 Pat. 243, 9 P.L.T. 747, 113 I.C. 106, A.I.R. 1928 Pat. 637 (638); *Bimal Jati v. Biranja*, 22 All. 238; *Harish v. Jahuruddin*, 2 C.W.N. 575. (In a later Madras case, it has been remarked, by way of obiter, that a right of pre-emption given to the mortgagee if the mortgagor wishes to sell the property even *within the period* of mortgage is a clog on redemption; for, in fact, a right of pre-emption may well prove a hindrance to a sale of the property for full value—*Tirumala v. Srinivasa*, 52 Mad. 300, 121 I.C. 753, A.I.R. 1929 Mad. 243, 250). But a stipulation that the mortgagee would pre-empt not by paying the market price of the day or the same price as that offered by a stranger, but the *price fixed* in the mortgage-instrument itself is oppressive and unconscionable—*Ramasami v. Chinnan*, 24 Mad. 449 (459). Similarly, a covenant by which the mortgagor binds himself to sell to the mortgagee at a *concession price*, i.e., at something less than the full value of the property is a clog on redemption and therefore void—*Tirumala v. Srinivasa*, 52 Mad. 300, 56 M.L.J. 318, A.I.R. 1929 Mad. 243 (250). If the mortgage-deed provides that the mortgagee shall have a right of pre-emption even if the mortgagor sells *after redeeming* the property, such a right exercisable after redemption amounts to a clog on redemption—*Ramasami v. Chinnan*, 24 Mad. 449 (455); *Tirumala v. Srinivasa*, supra.

(5) *Granting of leases*:—Leases between mortgagor and mortgagee (e.g., the granting of a usufructuary mortgage, and the subsequent grant of a lease to the mortgagor by the mortgagee) are very common and are

not bad in themselves, though like all other transactions between a mortgagor and mortgagee, they are to be looked upon with a certain amount of suspicion—*Mahomed Cassum v. Joseph*, 7 Bom.L.R. 772. Such leases to be valid should last only during the pendency of the mortgage. A lease which is to continue *after* redemption is a clog on redemption—*Ankinedu v. Subbiah*, 35 Mad. 744. See Note 362 (5) *ante*.

But where a usufructuary mortgagee granted a lease of the mortgaged property to the mortgagor for a term of years different from the term of the mortgage and the mortgagor executed a *kabuliyat* whereby he undertook to pay a fixed rent, and the rent was made a charge on the property, *held* that the two documents could not be read as forming one transaction but that they must be regarded as separate and independent transactions and that the mortgagor was entitled to redeem the mortgage independently of the *kabuliyat* and could not be compelled as a condition precedent of redemption to pay off the rent-charge created by the *kabuliyat*—*Khuda Buksh v. Alimunnissa*, 27 All. 313.

(6) There is no clog on the equity of redemption where the mortgagor stipulates that he will not be entitled to redeem the mortgaged property without first paying up the rents of the same property which he held as a tenant under the mortgagee—*Chatter Mal v. Baij Nath*, 28 All 712. See also 20 All. 401 in Note 369 below.

(7) *High rate of interest*:—The mere fact that a high rate of interest has been stipulated in a mortgage-deed does not entitle the mortgagor to put forward a case of clog, in the absence of any proof of undue influence or unfair dealing in the stipulation for interest—*Saheb Baksh v. Mahomed Ali*, 7 O.L.J. 389, 58 I.C. 115; *Sarfaraz v. Udawat*, 4 Luck. 147, 113 I.C. 46, A.I.R. 1929 Oudh 30 (32). See also *Baldeo v. Losai*, 5 O.W.N. 1091, A.I.R. 1929 Oudh 54 (55), and *Ram Krishna v. Herambo*, 33 C.W.N. 388 (390). But interest at 24 per cent. per annum with six-monthly rests on a mortgage amount of Rs. 98 only for a term of 50 years is hard and unconscionable—*Gajraj v. Munnu*, 4 Luck. 415, A.I.R. 1930 Oudh 173 (175), 126 I.C. 673. A stipulation for payment of interest at 24 per cent. on the mortgage-amount and on the cost of improvements made by the mortgagee, which were about ten times the mortgage-amount, was inequitable—*Bechu v. Bhabhuti*, 52 All. 831, A.I.R. 1931 All. 201 (202).

(8) *Stipulation to pay remuneration to mortgagee for services*:—An agreement whereby the mortgagee in possession agrees with his mortgagor to charge for his personal services, *e.g.*, an agreement for payment of a fair remuneration to the mortgagee (who acts as manager) of a large concern like a spinning and weaving mill to keep it in a high state of efficiency is not a clog on redemption—*Hope Mills Ltd. v. Cowasji*, 13 Bom.L.R. 162.

(9) A provision in the deed *postponing the mortgagor's taking possession* so long as there were fruit-bearing trees on the land planted by the mortgagee, is not a clog on the equity of redemption—*Genu Tukaram v. Narayan*, 45 Bom. 117 (123), 59 I.C. 258.

(10) A stipulation in a usufructuary mortgage of agricultural land that redemption should take place only in the month of Jeth, *i.e.*, before the mortgagee commences to sow the crops for the next season, is not a clog on the equity of redemption. The intention of the mortgagee is to permit redemption at a time when the crops are not standing—*Kirpal*

v. *Sheoambar*, 1930 A.L.J. 610, A.I.R. 1930 All. 283 (285), 126 I.C. 366. It is a reasonable practice to provide that redemption shall take place only in the *Khali fasl*, in the month of Jeth, when the crops are off the ground. The mortgagor is allowed a month within which to redeem the mortgage, and if he fails to redeem within the month, he must wait till the following year—*Sarbdawan v. Bijai*, 36 All. 551 (554). See also *Bansi v Girdhar*, 1894 A.W.N. 143; *Muhammad v. Baldeo*, 38 All. 148; *Narasingha v. Achhaibar*, 36 All. 36 (39).

364. Payment to whom to be made:—Where there are two or more joint mortgagees, a payment made by a mortgagor to one of them does not operate as a discharge of the debt so far as the other mortgagee or mortgagees are concerned. A payment to one mortgagee is valid only to the extent of his share of the debt. There is nothing to indicate that each of the mortgagees is a creditor for the whole; consequently payment to one would not liberate the debtor against all the creditors—*Hossainara v. Rahimannessa*, 38 Cal. 342; *Ray Satindra Nath v. Ray Jatindra Nath*, 31 C.W.N. 374, A.I.R. 1927 Cal. 425; *Jauhari v. Ganga*, 41 All. 631; *Umesh v. Dinabandhu*, 21 C.L.J. 570, 29 I.C. 966. In England also, the law is the same. As stated by Lord Alvanley M.R.: “Although the mortgagees take a joint security, each means to lend his own money, and take back his own”—*Morley v. Bird*, (1798) 3 Ves. 631; *Steeds v. Steeds*, (1889) 22 Q.B.D. 537; *Matson v. Dennis*, (1864) 10 Jur. N.S. 461; *Powell v. Broadhurst*, [1901] 2 Ch. 160. In a Madras case it was held that if there were several joint mortgagees, a mortgage was fully discharged by payment to one of them, though he was not an agent of the others—*Barber Maran v. Ramanna*, 20 Mad. 461. The Judges who gave this decision followed the English case of *Wallace v. Kelsall* (1840) 7 M. & W. 264. But the authority of this case has been considerably shaken by the decision in *Powell v. Broadhurst* (supra). The correctness of the Madras case has been doubted in several cases of the same High Court; See *Ahinsa Bibi v. Abdul Kader*, 25 Mad. 26; *Veeraswamy v. Ibramsa*, 19 M.L.J. 221, 1 I.C. 200; *Ramaswamy v. Muniandi*, 20 M.L.J. 709, 5 I.C. 343; *Sheikh Ibrahim v. Rama Aiyar*, 35 Mad. 685. Where it has been agreed between two joint creditors A and B that A alone shall receive the sum and not B, and the mortgagor *with notice* of that agreement and in defiance of it makes payment to B, it cannot be treated as a valid payment in discharge of the debt. It will be presumed to have been made in fraud of the person who was entitled to receive the money—*Chinnaramanuja v. Padmanabha*, 19 Mad. 471.

Similarly, where the original mortgagee dies, leaving two or more heirs jointly entitled to his estate, a payment made by the mortgagor of the amount due on the mortgage to one of those heirs without the concurrence of the rest does not amount to a valid discharge of the debt. The right which the several heirs jointly get on the mortgagee's death to enforce the mortgage is a right created by law in consequence of the devolution upon them of the single and indivisible right which the original mortgagee had as the sole promisee, and not in consequence of their being ‘joint promisees’—*Sitaram v. Sridhar*, 27 Bom. 292. See also *Banamali v. Talua Ramhari*, 5 P.L.J. 151, 55 I.C. 841. The principle is that several co-heirs constitute one heir and are connected together by unity of interest and unity of title. One of the heirs, therefore, cannot enforce the mortgage without the concurrence of the rest so as to give a valid discharge

to the mortgagor and free the mortgaged property from the incumbrance—per Tindal C.J. in *Decharms v. Horwood*, (1834) 10 Bing. 526.

A payment may be made to an authorised agent; but payment to an agent, who to the knowledge of the debtor had no authority to receive the payment or who disclaims authority to receive it, does not discharge the debtor—*Mackenzie Lyall v. Shib Chunder*, 12 B.L.R. 360; *Bai Rutten bai v. Fraser Ice Factory*, 32 Bom. 521.

365. Mode of payment:—A payment may be made not only in the current coin of the realm but in any other medium that the creditor may choose to accept—*Ragho v. Hari*, 24 Bom. 619. But ordinarily, a tender of money in payment of the debt must be made with the actual production of the amount in the current coin or in currency notes; and if a debtor sends a cheque or bill without any authority or request by the creditor that the amount should be remitted in that manner, the latter is not bound to accept it in payment—*Krishna Prosad v. Beni Ram*, 24 All. 85; *Jagat Tarini v. Naba Gopal*, 34 Cal. 305; *Wade's case*, 5 Co. Rep. 114a; *Polglass v. Oliver*, (1831) 2 Cr. & Jer. 15. When a tender is actually made but in a currency different from that required by law, *e.g.*, by a cheque on a banker, the objection to the *form* of the tender may be expressly or impliedly waived by the creditor, and he will be deemed to have waived the objection, if he rejects the tender on the ground of the insufficiency in amount or on some other ground, without making any objection to the legality of the tender in point of quality—*Jagat Tarini v. Naba Gopal*, 34 Cal. 305; *Polglas v. Oliver*, 2 Cr. & Jer. 15; *Jones v. Arthur*, 8 Dow. 442; *Caine v. Coulton*, 1 H.& C. 764. When a mortgage-debt is contracted in a particular currency, it should be repaid in that currency. Thus, where the loan was of Rs. 450 in the Poona currency, the decree must be for Rs. 430-2-11, which is equivalent in British currency to Rs. 450 of the Poona currency, and not for Rs. 450 of the British currency—*Trimbak v. Sakharam*, 16 Bom. 599 (603). Where in an old mortgage, the money had been advanced in *shikkai* coins, *held* that the mortgagor would be entitled to redeem on payment of money in British currency calculated according to the value of the *shikkai* coin—*Hiralal v. Narsilal*, 11 Bom.L.R. 318, 2 I.C. 469 (471).

Where no stipulation or covenant has been made between the contracting parties as to the payment of the sum in *instalments*, the lender is entitled to decline to receive payment in instalments, and can claim that the whole sum due be paid at one and the same time—*Behari Lal v. Ram Ghulam*, 24 All. 461.

366. Place of payment:—Where no specific contract exists as to place where the payment is to be made, it is the debtor's duty to seek out the creditor and to make payment where the creditor is—*Motilal v. Surjamal*, 30 Bom. 167; *Mahadaji v. Pairia*, 2 N.L.R. 62; and the creditor cannot be compelled to go to any place the debtor chooses—*Mahadaji v. Pairia*, *supra*. Where the mortgagee is deliberately keeping out of the way to avoid tender, in order that he might hold the property as long as he could, and after that, transfer it to a particular friend of his own, it will be sufficient if the money is tendered at the mortgagee's house or last place of abode—Fisher on *Mortgage*, 5th Ed., p. 717. The best course in such a case is to deposit the money in Court (Sec. 83).

367. Tender:—A good tender cannot be made by a stranger, or generally, by any person not entitled to the equity of redemption—

Watkins v. Ashwicke, Cro. Eliz. 132. A tender by one or more of several mortgagors is not such as a mortgagee is bound to accept, unless it is made conjointly by all the mortgagors, or on their behalf and with their consent—*Ram Baksh v. Mohunt Ram Lall*, 21 W.R. 428.

Actual production of money is not in all cases necessary to constitute a tender where it is shown that the creditor would not have accepted the money, even if produced—*Maung Po Tun v. Maung E. Kha*, 9 L.B.R. 18. Actual production of money may be dispensed with by the express declaration or equivalent act of the creditor, if the tender be otherwise sufficient; so that if the debtor says he has the sum ready in his pocket (stating the amount), and brought it for the purpose of satisfying the demand, or being in the house, offers to go and fetch it from another part of the house but the creditor desires him not to trouble himself to produce or to fetch the money, as he will not take it, or if the creditor not communicating personally with the debtor, refuses to authorize his agent to take the money, or to take it himself, the tender will be good.—*Fisher on Mortgage*, 5th Edn., p. 719. Thus, a mortgagor went to the mortgagee on the due date to pay the money due on the mortgage. The money, though not actually produced, was ready there and then for the purpose. But the negotiations fell through because the mortgagee demanded three months' extra interest. *Held* that there was a sufficient tender of money by the mortgagor—*Pestonjee v. Hormasjee*, 5 Bom.L.R. 387. But in some other cases it has been held that the money must be actually produced, unless the party entitled to payment waived it. A mere offer expressing willingness to pay is not sufficient—*Chetan Das v. Govind*, 36 All. 139; *Mahammad Mushtaq v. Banke Lal*, 42 All. 420; *Kamaya v. Devapa*, 22 Bom. 440. In an English case it was held that generally the money should be actually produced, for though the creditor may at first refuse, yet the sight of the money may tempt him to take it—*Thomas v. Evans*, 10 East 101.

The mortgagor is not bound to pay the executor of the mortgagee's estate until the latter obtains probate. Therefore, where the mortgagor got the money ready for immediate payment and intimated to the executors that the money was waiting to be paid to them, but did not actually make payment because the executors had not yet taken probate, there was a valid tender as from the time the intimation was given, and the mortgagor was not bound to pay any interest after that date—*Pandurang v. Dadabhoy*, 4 Bom.L.R. 453.

A tender of a smaller sum than is due is not a good tender—*Chunder v. Jodoonath*, 3 Cal. 468.

See also Note 509 under sec. 84.

368. Tender whether necessary before suit:—It was once held in an Allahabad case that the mortgagor was not entitled to bring a suit for redemption unless he had made a tender (*i.e.*, offer of payment) of the mortgage-money; and in a suit for redemption it must be shown that he had made such a tender—*Muhammed Ali v. Baldeo Pande*, 38 All. 148, 14 A.L.J. 56; see also *Md. Mushtaq v. Banke Lal*, 42 All. 420. But this view has now been changed. The same High Court now lays down that all that sec. 60 means is that there is an inherent right in the mortgagor to require the mortgagee to deliver the mortgage-deed etc., when the mortgagor pays the amount due at a proper time and place. It does not necessarily mean that before a suit for redemption can be instituted

the amount must be paid or tendered. In other words, his right to claim redemption on payment of the mortgage-money exists although he has not yet made any tender, provided the mortgage-money has become payable—*Het Singh v. Behari Lal*, 43 All. 95 (97), 59 I.C. 92; *Saiyed Ahmad v. Dharmun*, 43 All. 424 (426); *Mewa Ram v. Ganga*, 17 A.L.J. 910, 52 I.C. 229. All that this section lays down is a definition of the right of redemption; it does not prescribe the conditions under which a suit for redemption can be instituted, and does not require that a tender must be made before the beginning of the suit—*Raghunandan v. Raghunandan*, 43 All. 638 (641, 642) (F.B.) 19 A.L.J. 572; *Dinanath v. Ramarai*, 6 Pat. 102, A.I.R. 1926 Pat. 512. The Madras High Court likewise holds that this section does not apply to a suit for redemption but to redemption by private arrangement alone, and therefore the non-payment or non-tender of the amount due on the mortgage previous to suit is not a bar to a suit for redemption—*Butchanna v. Varahulu*, 24 Mad. 408.

Where the mortgage-money is alleged to have been satisfied out of the usufruct, a tender is out of the question—*Het Singh v. Behari Lal*, 43 All. 95 (98).

369. "Mortgage-money":—The term *mortgage-money* has been defined in section 58 as "principal money and interest." A mortgagee is entitled to treat the interest due under a mortgage as a charge on the mortgaged property, in the absence of any contract to the contrary; and the mortgagor is bound to pay, upon redemption, not only the principal debt but the interest also—*Ganga Ram v. Nathu Ram*, 5 Lah. 425 (427, 428), (P.C.), 80 I.C. 820, A.I.R. 1924 P.C. 183. The word 'mortgage-money' includes all money which on taking an account between the parties may be properly allowed to the mortgagee; it includes costs of litigation properly undertaken by him—*Nadershaw v. Shirinbai*, 25 Bom.L.R. 839, A.I.R. 1924 Bom. 264; it will include costs incurred by the mortgagee in defending an unsuccessful redemption suit brought by the mortgagor; and the latter is bound to pay the same before redemption. The Transfer of Property Act is not a consolidating statute; (note that the word 'consolidate' does not occur in the preamble); and the right of a mortgagee to a general account of the moneys due to him under the mortgage-contract is saved by the provisions of sec. 2 (b) of this Act, and this right has not been cut down by sec. 58 to an account merely of the principal money and interest—*Varadarajulu v. Dhanalakshmi*, 16 M.L.T. 365, 26 I.C. 184. So also, a mortgagee of agricultural land spending money with the consent of his mortgagor in repairing a well on the property which had been rendered useless by natural causes is entitled to add the amount so expended to his mortgage-debt to be paid by the plaintiff before the latter could claim redemption—*Durga v. Naurang*, 17 All. 282. See also notes under sec. 72.

Where there have already been payments in part satisfaction of the mortgage, the payment of the balance will entitle the mortgagor to redemption—*Hira Kuer v. Palku*, 3 P.L.J. 490.

Where a sale-deed by which the plaintiff conveyed his land to the defendant for Rs. 600, contained a clause by which the purchaser undertook to "resell the land to the vendor at his request within three years for Rs. . . . (blank)," held that the transaction amounted to a mortgage (by conditional sale); that the omission to insert the amount of the price for repurchase was either due to an oversight or intentional; and that

in the absence of any specific agreement as to the payment of a different sum for redemption, the mortgagor was entitled to redeem on payment of the "mortgage-money" which in this case meant the amount actually due under the deed (*i.e.*, Rs. 600)—*Maung Pe Gyi v. Hakim Ally*, 2 Rang. 113 (116).

Where a usufructuary mortgagee, instead of taking possession, granted a lease of the property to the mortgagor, the amount of rent payable under the lease being equal to the amount of interest payable under the mortgage, *held* that any arrears of rent must be treated as arrears of interest included in the mortgage-money and therefore a charge on the property, and the mortgagor is not entitled to redeem the property without payment of the arrears—*Imdad Hasan v. Badri Prasad*, 20 All. 401 (407). See also *Chatter Mal v. Baij Nath*, 28 All. 712. Cf. *Altaf Ali v. Lalta Prasad*, 19 All. 496 (498) cited in Note 403 under sec. 67.

Where it was stipulated that the mortgagor would pay interest until delivery of possession of the mortgaged property to the mortgagee, *held* that after the mortgagee took possession the mortgagor was not bound to pay interest and was entitled to redeem on payment of the principal sum only—*Partab v. Gajadhar*, 24 All. 521 (531) (P.C.).

370. Mortgagor's right on redemption:—The mortgagor, after paying or tendering the money, can compel the mortgagee (a) to deliver the mortgage-deed, if any; (b) to deliver possession of the property; and (c) either to reconvey the mortgaged property to the mortgagor; or to execute a registered acknowledgment.

(a) *Return of Mortgage-deed:*—The mortgagee is bound to return not only the mortgage-deed but also "all documents relating to the mortgaged property which are in his possession or power." These words have been added by the Amendment Act, 1929. Similar amendment has been made in sec. 83.

(b) *Delivery of possession:*—Where the mortgagee was in possession of the mortgaged property, he is bound to deliver possession of the property to the mortgagor. Moreover, the mortgagee is bound to account for and to restore the property in its entirety, and he cannot be heard to say that he does not know what has happened to a portion of the property mortgaged—*Ramchandra v. Makund*, 3 Bom.L.R. 152. If a portion of the mortgaged lands is lost through the negligence of the mortgagee, he is bound to pay for it—*Anandrao v. Bhikaji*, 46 Bom. 218, A.I.R. 1922 Bom. 156. It is the duty of the mortgagee to identify fully the property mortgaged; if he mixes the mortgaged property with his own, the onus will be upon him of distinguishing his own property, and if he is unable to do so, the mortgagor will be entitled to the whole property—*Ramchandra v. Makund*, 3 Bom.L.R. 152 (following *Wake v. Conyers*, 2 W. & T.L.C. 438).

When a mortgage is redeemed, the mortgagee is bound to restore the property in the same position in which it was when he took possession. He must therefore restore the property free from the mortgage and all other incumbrances created by him. Where, therefore, he has transferred a portion of the mortgaged land under a lease, the lease comes to an end when the mortgage is redeemed—*Ramchand v. Raj Hans*, 3 A.L.J. 517; *Subrao v. Munjapa*, 16 Bom. 705.

Where the mortgagee in possession obtains possession over some plots of land in addition to the mortgaged property, presumably doing so in

his capacity as mortgagee, he must deliver over those plots of land to the mortgagor on redemption and is not entitled to retain possession thereof; and he is also bound to account to the mortgagor for mesne profits in respect thereof—*Dildar v. Shukrullah*, 46 All. 152 (153), 78 I.C. 1023, A.I.R. 1924 All. 444. Cf. sec. 63.

(c) *Reconveyance of mortgaged property*:—Such reconveyance can be demanded only in the case of an English mortgage. “I presume that, as there is no transfer of the mortgaged property itself, strictly speaking, except perhaps in the case of an English mortgage, a reconveyance can be demanded by a mortgagor only when the security takes the form of an English mortgage”—Ghose’s *Law of Mortgage*, 5th Edn., p. 271.

371. Extinguishment of right of redemption:—By act of parties:—The ‘act of parties’, a phrase used here and elsewhere in the Act in contradistinction to “operation of law”, must denote a release or other such transaction *standing apart* from the mortgage transaction under which the right of redemption comes into existence. There is no extinguishment of the right by act of parties when, by virtue of a stipulation contained *in the very contract* under which the right is created, that right ceases to exist. Therefore a condition in the mortgage-deed itself to the effect that on default of payment on a certain date, the mortgage shall be treated as an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of this section—*Perayya v. Venkata*, 11 Mad. 403. A mortgage by conditional sale does not become irredeemable after the expiry of the period fixed; the right of the mortgagor to redeem the property remains unaffected by the expiry of the term—*Lalta Prasad v. Jagdish*, 48 All. 787, 24 A.L.J. 1057, A.I.R. 1927 All. 137 (140), 98 I.C. 961; *Balkissen v. Legge*, 22 All. 149 (P.C.). But if the restrictive condition is entered into *subsequently* to the mortgage transaction, the contract will have the effect of extinguishing the right of redemption—*Ram Singh v. Baij Nath*, 17 A.L.J. 117, 49 I.C. 353. See also 27 Bom. 297 and 22 Bom.L.R. 965 cited in Note 362 (4) *ante*. The ‘act of parties’ means an act *subsequent* to the mortgage-transaction; there can be no extinction of the right of redemption by any agreement contained in the transaction itself, for the law as codified in sec. 60 giving the mortgagee a right of redemption prevents him from contracting himself out of it—*Ambu v. Kelu*, 53 Mad. 805, 123 I.C. 584, A.I.R. 1930 Mad. 305 (313).

A mere admission by a mortgagor or an understanding between him and the mortgagee that the latter has become the owner of the mortgaged property does not extinguish the mortgage or destroy the right of redemption of the mortgagor—*Ram Singh v. Baij Nath*, 17 A.L.J. 117, 49 I.C. 353. Sometime after the execution of a usufructuary mortgage, the mortgagor entered into a registered contract to sell the equity of redemption to the mortgagee but the sale-deed was never executed. *Held* that there was no transfer of the equity of redemption and the right to redeem was not lost—*Sitla Sahai v. Dhum Singh*, 28 O.C. 100, 11 O.L.J. 543, A.I.R. 1925 Oudh 114 (115).

Where the mortgagee in collusion with the Forest Department took other lands in exchange for the mortgaged lands from the Government (who acquired the mortgaged lands), *held* that the mortgagee would be deemed to be a trustee for the mortgagor in respect of the new plots of lands, which the mortgagor would be entitled to redeem, and the latter’s

right of redemption was not extinguished—*Babaji v. Magniram*, 21 Bom. 396. The mere fact that one of several co-mortgagors is the registered occupant of the mortgaged land does not entitle him to transfer the portion of the equity of redemption belonging to his co-mortgagors. Such a transfer in favour of the mortgagee does not operate to extinguish the right of the co-mortgagors to redeem their shares of the mortgaged land—*Lalchand v. Khandu*, 22 Bom.L.R. 1431, 59 I.C. 762 (763).

The withdrawal by the mortgagor of a previous suit for redemption does not extinguish the right of redemption or bar a second suit for redemption—*Ramchandra v. Hanmanta*, 44 Bom. 942, 58 I.C. 42. So also is the effect of a compromise—*Basangouda v. Rudrappa*, 28 Bom.L.R. 1507, A.I.R. 1927 Bom. 87.

372. Auction-purchase of mortgaged property by the mortgagee:

—If a mortgagee has attached the mortgaged property in execution of a money-decree obtained by him against the mortgagor for a debt other than the mortgage, or in execution of a decree obtained by him upon a subsequent mortgage, and has himself purchased the property at the sale in execution of that decree, such sale does not extinguish the mortgage or destroy the right of redemption of the mortgagor—*Martand v. Dhondo*, 22 Bom. 624; *Nand v. Hari Raj*, 20 All. 23 (F.B.). The same reasoning applies to a mortgagee purchasing the equity of redemption under a decree obtained on a collateral instrument to secure the same mortgage-debt—*Martand v. Dhondo*, 22 Bom. 624. The same principle applies also to a case when a mortgagee buys the equity of redemption at a Court auction held in execution of a personal decree for money obtained by a third person against the mortgagor, even though there be no fraud or collusion between him and the third party—*Erusappa v. Commercial Land Mortgage Bank*, 23 Mad. 377. In all these cases the mortgagee-purchaser does not acquire the property free from the equity of redemption, but it is liable to be redeemed by the mortgagor. The reason in support of this view is the “impossibility of the mortgagee by such sales and purchases as these freeing himself from his liability to be redeemed”—*Martand v. Dhondo*, 22 Bom. 624. Indeed, by reason of the advantage which his position as mortgagee gives him over competing bidders in respect of his presumably superior knowledge or better opportunities of knowledge of the mortgaged property and its value and otherwise, the mortgagee must be looked upon as availing himself of his position as mortgagee who obtained an undue advantage over the mortgagor or otherwise acting *mala fide* in the eye of the law (whether there be actual fraud or collusion or not), and in contravention of the principle which underlies Sec. 99 (old) of the Transfer of Property Act and which is given expression to in Sec. 88 of the Indian Trusts Act—*Erusappa v. Commercial Land Mortgage Bank*, 23 Mad. 377. Where the mortgaged land was sold for arrears of revenue owing to the default of the mortgagee, and was purchased by him at the auction-sale, such sale did not deprive the mortgagor of his right to redeem—*Thakur Jai Karan v. Sheo Kumar*, 50 All. 36, A.I.R. 1927 All. 747 (748); *Kalappa v. Shivayya*, 20 Bom. 492 (494); *Lakshmayya v. Appadu*, 7 Mad. 111 (112).

Purchase by mortgagee of a portion of mortgaged property—

Effect:—If several items of property are mortgaged, and the mortgagee purchases one of the items, the question arises whether the mortgagee ought to *give credit* to the mortgagor for the value of the property

purchased by him and proceed against the other items for the *balance*, or whether the mortgagee is entitled to proceed against the other items for the *full amount* of his mortgage-debt. The determination of this question depends on whether the mortgagee purchased only the *equity of redemption* or the *entire* interest of the mortgagor in that item of property. If the mortgagee purchased only the equity of redemption he must allow proportionate reduction to the extent of the amount fairly chargeable upon the property purchased by him; and he cannot claim the entire debt from the other properties—*Bisheshur v. Ram Sarup*, 22 All. 284 (F.B.); *Ponnambala v. Annamalai*, 43 Mad. 372 (379) (F.B.); *Bohra Thakur Das v. Collector*, 28 All. 593; *Nyaunglebin Co-operative Bank v. Maung Ba*, 6 Rang. 217, A.I.R. 1928 Rang. 266. (This is in consonance with the doctrine of contribution enunciated in sec. 82). But where the circumstances under which the purchase was made show that it was purchased free from all encumbrances, the mortgagee can enforce his entire security against the remaining property, because the mortgagor impliedly agreed, by receiving the full value of the property, that no portion of the mortgage-debt would be extinguished by virtue of the purchase by the mortgagee—*Jasodha v. Kali Kumar*, 34 C.W.N. 673 (674, 675), A.I.R. 1930 Cal. 619; *Mir Eusuff v. Panchanan*, 15 C.W.N. 800 (804, 805), 11 C.L.J. 639, 6 I.C. 842.

If the mortgagee purchases only the equity of redemption, the purchase has the effect of discharging the mortgage-debt to an extent proportionate to the extent of the property purchased, *i.e.*, the purchase will discharge a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the entire property comprised in the mortgage (even though the value of the property purchased be equal to the amount due on the mortgage)—*Ponnambala v. Annamalai*, 43 Mad. 372 (379, 380) (F.B.); *Shamshad Ali v. Mahammad Ali*, 21 O.C. 172; *Bisheshar Dial v. Ram Sarup*, 22 All. 284 (F.B.); *Nyaunglebin Co-operative Bank v. Maung Ba*, 6 Rang. 417, A.I.R. 1928 Rang. 266. Compare *Lakhmi Das v. Jamnadas*, 22 Bom. 304 (313). In this respect there is no distinction in principle between a private sale and an execution sale, *i.e.*, whether the mortgagee purchases a portion of the mortgaged property under a private contract or at Court auction. The distinction is not so much between a private sale and an execution sale, as between a purchase of the equity of redemption and a purchase of the entire interest of the mortgagor in the property—*Mir Eusuff v. Panchanan*, *supra*; *Mutty Lal v. Nanda Lal*, 12 C.W.N. 745, 8 C.L.J. 92.

373. Extinguishment of right of redemption by decree of Court:

—The mortgagor's right of redemption is extinguished by a final decree of the Court for foreclosure. So long as such a decree has not been passed, the right to redeem is not extinguished by reason of non-payment of the money within the time fixed by the preliminary decree for foreclosure. The Court can extend the time for payment. See O. 34, r. 2 in the Appendix. The mortgagor can redeem at any time until the final decree is made under O. 34, r. 3—*Parash Nath v. Ramjadu*, 16 Cal. 246; *Somesh v. Ram Krishna*, 27 Cal. 705. In a suit for sale, a mortgagor has the right to redeem at any time before the actual sale, notwithstanding the fact that a final decree for sale has been passed—*Syed Shah v. Ismail*, 42 All. 517; *Sukhi v. Gulam*, 43 All. 469 (P.C.). See also *Bibijan v.*

Sochi Bewa, 31 Cal. 863 (S.B.); *Misri Lal v. Mittu Lal*, 28 All. 28; *Adipuranam v. Gopalasami*, 31 Mad. 354. In *Krishnaji v. Mahadev*, 25 Bom. 104, the mortgagor was allowed to redeem the property even after its formal sale and *before confirmation*. This is now expressly provided in O. 34, r. 5 (1).

The word "decree" has been substituted for "order" in para 2, for the following reason:—"As the old practice of passing *orders absolute* in mortgage-suits has been abolished by the enactment of O. 34, in the C. P. Code, 1908, we propose, in secs. 60, 67 and 67A of the Transfer of Property Act, to substitute the word 'decree' for the word 'order' wherever it occurs."—*Report of the Select Committee* (1929).

The right of redemption is extinguished when the land is sold by order of the Government owing to non-payment of assessment, under sec. 56, Bombay Land Revenue Code—*Abdul Rahaman v. Vinayak*, 29 Bom. L.R. 1056, A.I.R. 1927 Bom. 540.

The order (decree) of Court does not mean an order passed without any trial or ordinary hearing of the parties. Such an order does not extinguish the right of redemption. Where a prior suit for redemption was compromised, and the Court passed the order: "Compromised: Dismissed with costs," *held* that this dismissal did not involve that the right of redemption was extinguished, and did not bar a subsequent suit for redemption—*Basangouda v. Rudrappa*, 28 Bom.L.R. 1507, A.I.R. 1927 Bom. 87 (90). So also, a previous dismissal of a suit for redemption for default of appearance does not extinguish the right of redemption, nor prevents the mortgagor from bringing a fresh suit for redemption—*Shridhar v. Ganu*, 52 Bom. 111, A.I.R. 1928 Bom. 67; *Kashiram v. Maheshwar*, 30 Bom.L.R. 1089, A.I.R. 1929 Bom. 116 (118). An abatement of a previous suit brought by the father does not bar a second suit for redemption brought by the son—*Ramchandra v. Shripatrao*, 40 Bom. 248, 33 I.C. 771.

374. Para 4:—Notice before redemption:—The fourth para is merely an enabling clause, and does not make it compulsory on the part of the mortgagor to give notice, but merely validates it, if provided for in the deed. The object of notice is to give the mortgagee a reasonable time to enable him to find another borrower.

Where a mortgage contains a provision that the *mortgagee*, if he wanted payment of the mortgage money, must give notice before the beginning of the cultivating season in any year, *held* that the provision did not affect the mortgagor who could bring a suit for redemption at any time—*Rarichan v. Manakkal Raman*, 44 M.L.J. 515, A.I.R. 1923 Mad. 553 (556).

375. Para 5:—Redemption of portion of mortgaged property:—The principle of the last para is that in a mortgage transaction the creditor values his security as one and indivisible, and if the mortgagor is allowed to redeem the property piecemeal, the mortgagee would suffer in the depreciation which may be caused to it in consequence. Suppose that each of the mortgagor sells his portion of the property; now the purchaser of a fragment of the equity of redemption may come before the Court without bringing the other purchasers, and have an account as between the mortgagee and himself alone, so that the mortgagee may be paid off piecemeal. Such a course would result in great injustice to the mortgagee. It would put him to a separate suit against each purchaser of a fragment of the

equity of redemption purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be created—*Nilakant v. Suresh Chandra*, 12 Cal. 414 (423) (P.C.). But where the mortgagee acquires a part of the mortgaged property and thus a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, the indivisible character of the mortgage is broken up, and one of several mortgagors may in such a case redeem his own share only on payment of a proportionate part of the mortgage-money—*Kallan Khan v. Mardan Khan*, 28 All. 155; *Pawan Kumar v. Dulari Koer*, 5 P.L.J. 544.

Thus, the general rule under this clause is that a mortgage is indivisible, and a suit by a co-mortgagor to redeem only his portion of the properties mortgaged is not maintainable—*Nago Rao v. Nago*, 10 N.L.R. 72; *Aughore Kumar v. Mahomed Mussa*, 2 I.C. 662; *Jagabandhu v. Haladhar*, 27 C.L.J. 110; *Lala Ram Narain v. Lala Murlidhar*, 5 P.L.J. 644, 1 P.L.T. 616, 58 I.C. 129. A mortgage for an entire sum is from its very purpose indivisible; a division of such a mortgage is conceivable in theory, and may be carried out in practice. But in order that a mortgage may fully attain its end of securing satisfaction of the entire obligation in the rank and with the efficiency which the law or the will of the parties determined, it is essential that it should not suffer any disintegration—*Keelleber on Mortgage in Civil Law*, pp. 11, 12; *Huthasanam v. Parameswaran*, 22 Mad. 209 (211, 212).

A mortgagor of an undivided share may redeem the entirety, at any rate if the mortgagee does not object, and will be compelled to do so, if required by the mortgagee—*Chaudhuri Ahmed Baksh v. Seth Raghubar Dayal*, 28 All. 1 (17) (P.C.). This section does not debar the owner of a part of the equity of redemption from offering to redeem the whole mortgage. Indeed, he is bound to offer to redeem the whole—*Srikanta v. Jag Sah*, 3 Pat. 818 (823), A.I.R. 1925 Pat. 57, 84 I.C. 293. It is the law in India, as in England, that one of several mortgagors can redeem the entire mortgage, without the consent of the owners of the other shares, subject to the safeguarding of the rights which those owners may possess—*Yadalli Beg v. Tukaram*, 48 Cal. 22 (29) (P.C.). As the owner of the equity of redemption of one of two estates comprised in the same mortgage cannot insist on redeeming that estate separately, so he cannot be compelled to redeem it separately, his right being to redeem the whole, subject to the equities of the other persons interested—*Hall v. Heward*, L.R. 32 Ch. D. 430; *Pearce v. Morris*, L.R. 5 Ch. 227.

So also, a purchaser of a portion of the mortgaged property is not at liberty to redeem that portion only without redeeming the rest—*Kuppusami v. Papathi*, 21 Mad. 369 (371); *Yadalli Beg v. Tukaram*, 48 Cal. 22 (28) (P.C.), 57 I.C. 585; *Nainappa v. Chidambaram*, 21 Mad. 18 (26); *Huthasanam v. Parameswaran*, 22 Mad. 209 (212). The purchaser of a portion of the equity of redemption is entitled to maintain a suit for redemption of the entire mortgage—*Huthasanam v. Parameswaran*, 22 Mad. 209 (211); *Baikuntha v. Mahesh*, 22 C.W.N. 128 (129); *Pratap Chandra v. Peary Mohan*, 22 C.W.N. 800 (802); *Rugad Singh v. Sat Narain*, 27 All. 178 (179, 182).

A partial owner of the equity of redemption is entitled to redeem the

whole mortgage—*Fakir Chand v. Babu Lal*, 39 All. 719 (721); *Sankar v. Bhikaji*, 53 Bom. 353; *Baikuntha v. Mahesh*, 22 C.W.N. 128 (129) (dissenting from *Girish v. Juramani*, 5 C.W.N. 83); *Pratap Chandra v. Peary Mohan*, 22 C.W.N. 800 (802); *Rugad Singh v. Sat Narain*, 27 All. 178 (182); and this he can do even against the will of the mortgagee—*Fakir Chand v. Babu Lal*, supra; *Huthasanam v. Parameshwaran*, 22 Mad. 209 (211); *Velayudam v. Alangaran*, 15 I.C. 605, 23 M.L.J. 475; *Mustafa v. Shadi Lal*, 10 O.C. 81 (84). As observed by the Privy Council, each and every one of the mortgagors who owns separate shares in certain mortgaged property is not merely interested in the payment of the mortgage-money and the redemption of the estate, but *has a right* by payment of the money to redeem the estate, seeking contribution from the others—*Norender v. Dwarka*, 3 Cal. 397 (P.C.), 5 I.A. 18 (27).

"The character of indivisibility exists not only with reference to the mortgagee, who may generally be more benefited thereby, but also with reference to the mortgagor. And save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either a partial interest in the subject, can under the mortgage get relief, except in consonance with the principle of indivisibility"—*per* Subramania Ayyar J. in *Huthasanam v. Parameshwaran*, 22 Mad. 209 (212).

The mortgagor who redeems the whole property is entitled to a rateable contribution from the other mortgagors, and he is entitled to hold the entire property in charge until he is in turn redeemed by his co-shares on payment of their quota of the debt, with all incidental expenses—*Jagat Narain v. Qutab Hussain*, 2 All. 807; *Changa Das v. Gansing*, 20 Bom. 615. Until then, he is to all intents and purposes in the position of the mortgagee redeemed—*Asansah v. Vamana*, 2 Mad. 223. See secs. 92 and 95.

The rule as to indivisibility of a mortgage applies not only where there are several mortgagors but also where there are several mortgagees. And no redemption can be effected of a portion of the mortgaged property by paying to one of the mortgagees his separate debt—*Sunitibala v. Dhara Sundari*, 47 Cal. 175 (179) (P.C.).

But the rule in this para should be applied subject to a *contract to the contrary*. Therefore, where one of the terms of a mortgage was that the mortgagor might redeem any portion of the mortgaged property upon payment of a proportionate part of the debt, one of the heirs of the mortgagor was allowed to redeem his own share of the property—*Shafaatullah v. Izzatullah*, 13 A.L.J. 372, 28 I.C. 677 (678). Where the mortgage is invalid for absence of a registered deed, the rules relating to partial redemption of a mortgage are not applicable, and a purchaser of a portion of the mortgaged property can obtain the area bought by him on re-payment of a proportionate amount of the debt. He will not be required to redeem the whole mortgage—*Maung Tun v. Maung Aung Dun*, 2 Rang. 313 (319).

376. Acquisition by mortgagee of the share of a mortgagor:—The mortgage-debt may be apportioned where circumstances have happened, the effect of which, in fact or in law, is to create a severance of the security; *e.g.*, where the mortgagee himself has become the owner of a part of the equity of redemption or where by his own conduct there has been a break up of the entire security. The test is, whether there has been

a severance of the security at the instance or with the consent of the mortgagee, and an apportionment will not be imposed upon the mortgagee unless equitable considerations are established—*Debendra Nath v. Mirza Abdul*, 10 C.L.J. 150, 1 I.C. 264 (277). If a part of the mortgaged property be acquired by a sole mortgagee (or by all the mortgagees where there are more mortgagees than one), the integrity of the mortgage is thereby broken up, and each of the owners of the remainder of the property becomes entitled to redeem his own share upon payment of a proportionate part of the amount due on the mortgage—*Kudhai v. Sheo Dayal*, 10 All. 570; *Shiam Saran v. Banarsi*, 20 A.L.J. 258, A.I.R. 1922 All. 192, 66 I.C. 866; *Nilakant v. Suresh*, 12 Cal. 414 (P.C.); *Debendra v. Mirza Abdul*, 10 C.L.J. 150, 1 I.C. 264; *Raghunath v. Sadhu Saran*, 5 P.L.T. 312, A.I.R. 1925 Pat. 31, 75 I.C. 821; *Nand Kishore v. Raja Hariraj*, 20 All. 23; *Moro v. Balaji*, 13 Bom. 45. Thus, when a mortgage is split up by the mortgagee buying up the equity of redemption from some of the heirs of the original mortgagor, any one of the remaining heirs is entitled to redeem his share of the mortgaged property on payment of a proportionate sum due on his share—*Mewa Ram v. Ganga Ram*, 17 A.L.J. 910, 52 I.C. 229. This rule equally applies whether the mortgagee-decreeholder acquires a part of the mortgaged property *before* a decree for sale or *after* it—*Sarju Kumar v. Thakur Prosad*, 18 A.L.J. 690, 58 I.C. 743. This rule also enures to the benefit of the *purchaser* of a portion of the equity of redemption; so that, when the mortgagee has destroyed the indivisibility of the original contract, the *purchaser* of the equity of redemption of a portion of the mortgaged property is entitled to redeem that portion on payment of a proportionate amount of the mortgage-money—*Marana v. Pendyala*, 3 Mad. 230; *Mahabir v. Mohammad*, 38 All. 103; *Subramanyan v. Mandyan*, 9 Mad. 453.

But in such cases, (*i.e.*, where the mortgagee acquires a portion of the mortgaged property, and a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, and the indivisible character of the mortgage is broken up) neither a co-mortgagor nor the purchaser of a portion of the equity of redemption is entitled to redeem *more than his own share* in the property. Each co-mortgagor or purchaser may redeem *his own share only*, on payment of a proportionate part of the mortgage-money; but he cannot claim to redeem the shares of other persons in which he is not interested, against the wishes of the mortgagee—*Kullan Khan v. Mardan Khan*, 28 All. 155 (157); *Munshi v. Daulat*, 29 All. 262 (263); *Dina Nath v. Luchmi Narain*, 25 All. 446; *Jagannath v. Jaipal*, 55 All. 359 (F.B.), A.I.R. 1933 All. 257 (259); *Rathna Mudali v. Perumal*, 38 Mad. 310; *Ahamad Husain v. Md. Qasim*, 48 All. 171, 24 A.L.J. 88, A.I.R. 1926 All. 46; *Zaibunissa v. Parbhu Narain*, 39 All. 618; *Girish Chander v. Juramani*, 5 C.W.N. 83; *Mustafa v. Shadi Lal*, 10 O.C. 81 (84); *Jai Govind v. Abhai Raj*, 26 O.C. 308, A.I.R. 1924 Oudh 40; *Mahomed Zaki Ali v. Ahmad Shah*, 7 O.L.J. 585, 58 I.C. 983; *Ramadhin v. Jokhan*, 5 O.L.J. 248, 47 I.C. 115; and the mortgagee can claim from the co-mortgagor or his assignees only so much of the mortgage-debt as is proportionate to the portion of the mortgaged property owned by them—*Ko Thina v. Ismail Cassim*, 1 Bur.L.J. 117, 68 I.C. 887. Where the rights of the mortgagors have vested partly in a prior mortgagee and partly in a subsequent mortgagee after a suit had been brought by each of them to enforce his own mortgage without impleading the other, neither the former can be compelled to redeem the whole nor can he compel

the latter to give up his interest in the share which he has acquired. Each can redeem to the extent of the shares of his mortgagors acquired by him—*Amba Prosad v. Wahidullah*, 44 All. 708 (710, 711), A.I.R. 1922 All. 405, 68 I.C. 260.

But this rule does not apply where the mortgage is split up not by the mortgagee, but by the act of one of the *mortgagors*. Thus where by the terms of a mortgage-deed, one of the four mortgagors was allowed to redeem separately his one-fourth share by paying one-fourth of the mortgage-debt, the integrity of the mortgage was not broken up by any act of the *mortgagee*, and another mortgagor (who was entitled to $\frac{1}{4}$ share) could redeem the whole of the remaining $\frac{3}{4}$ share and to obtain possession of the same—*Shafaatullah v. Izzatullah*, 13 A.L.J. 372, 28 I.C. 677 (678).

A distinction has been drawn by the Bombay High Court between cases in which the mortgagors are the owners of distinct parcels of land, and cases in which the mortgagors are joint tenants or tenants-in-common in the mortgaged property; and the High Court lays down that in the event of the mortgagee becoming the owner of a portion of the equity of redemption, if the mortgagors are owners of *distinct* parcels of land, each of them can redeem only to the *extent of his share*, but if they are joint tenants or tenants-in-common in the mortgaged property, they must redeem the whole—*Bhikaji v. Lakshman*, 15 Bom. 27 Note; *Narayan v. Ganpat*, 21 Bom. 619. But the Allahabad High Court does not recognize such distinction and lays down that each of the mortgagors (whether they are owners of distinct parcels or are joint tenants or tenants-in-common) is entitled to redeem his own share only, on payment of a proportionate part of the mortgage-debt. See *Kullan v. Mardan*, 28 All. 155; *Dina Nath v. Luchmi*, 25 All. 446; *Munshi v. Daulat*, 29 All. 262; *Zaibunissa v. Parbhu*, 39 All. 618 (621); Ghose's *Law of Mortgage*, 5th Edn., pp. 266-267, where this subject has been fully discussed. See also *Id. Ismail v. Sharfutullah*, 57 Cal. 872, 129 I.C. 310, A.I.R. 1930 Cal. 810 (814).

Where the mortgagee has purchased the equity of redemption in one portion of the mortgaged property, but there has been no severance of the equity of redemption according to the shares of the mortgagors, one mortgagor can redeem the whole of the remaining portions of the mortgaged property—*Sidheswar v. Ganpatrao*, 50 Bom. 331, 28 Bom.L.R. 588, 96 I.C. 361, A.I.R. 1926 Bom. 303.

The rule in this section applies when the mortgagee acquires the 'share of a mortgagor' *i.e.*, a portion of the mortgaged property. But where the mortgagee purchases the *whole* of the mortgaged property in execution of a decree in a suit on his mortgage, without impleading a purchaser of the equity of redemption in a portion of the property, there is no splitting up of the mortgage, and the purchaser of the equity of redemption is liable to redeem his portion of the mortgaged lands only on payment of the entire decree amount—*Venkat Reddy v. Kunjappa*, 47 Mad. 551 (566).

The rule in this section does not apply where a mortgagor makes a deposit in Court of the whole mortgage-money under section 83. The owner of a share only of the mortgaged properties is entitled to deposit in Court the whole of the mortgage-debt and redeem the whole mortgage, in spite of the fact that the mortgagee has purchased the equity of redemption in some of the mortgaged properties. In such case, the part owner

of the mortgaged properties becomes entitled, upon such deposit, to all the mortgagee's rights including the right to possession (if the mortgagee was a mortgagee in possession) of the whole of the mortgaged properties, including those purchased by the mortgagee—*Subba Rao v. Sarvarayudu*, 47 Mad. 7 (11, 20).

This clause applies when *all the* mortgagees (when there are more than one) have acquired the share of a mortgagor. If, however, *some* only of the mortgagees have purchased a share of a mortgagor, there is no merger of interest, for the purchaser is not the sole mortgagee. In such a case, a co-mortgagor has no right to redeem his share of the mortgaged property by payment of a proportionate part of the mortgage-debt but is bound to pay the entire mortgage-debt—*Mahtab Rai v. Sant Lal*, 5 All. 276; *Mohan Lal v. Parshadi Lal*, 45 All. 46 (48), 74 I.C. 999, A.I.R. 1924 All. 11; *Subba Rao v. Sarvarayudu*, 47 Mad. 7 (19); *Jagmohan v. Harbans*, 1 O.W.N. 637, A.I.R. 1925 Oudh 609. The purchaser-mortgagee is in no different position from an outsider so far as his rights conferred by his purchase are concerned. The mortgage remains one and undivided, and if redeemed at all, can only be redeemed in its entirety—*Jagmohan v. Harbans*, (supra).

"Acquired":—The word 'acquired' in this section is not restricted to acquisition by *purchase*, but it also applies to acquisition by any other mode of transfer recognised by law. Thus, where the mortgagee has acquired a share of the mortgaged property by *foreclosure*, an owner of another portion of the equity of redemption is entitled to redeem his portion without redeeming the whole mortgage—*Brij Kishore v. Madho Sing*, 28 All. 279 (280). So also, where the mortgagee acquires a portion of the mortgaged property by *inheritance*, there is a merger of rights, and the integrity of the mortgage is broken up. In such a case, a co-mortgagor will be allowed to redeem his own share only—*Hamida Bibi v. Ahmed Husain*, 31 All. 335; *Zafar v. Zubaida*, 27 A.L.J. 1114, A.I.R. 1929 All. 604 (606), 121 I.C. 398. Similar results follow where the mortgagee purchases a portion of the mortgaged property at a sale in execution of a money-decree—*Ariyaputri v. Alamelu*, 11 Mad. 304. Where the mortgagee who is entitled to possession of the mortgaged properties gets possession of only half of the properties by consent of the mortgagors, and the possession of the other half is withheld, it cannot be said that the mortgagee by accepting possession of half the property only had acquiesced in the integrity of the mortgage being broken up; and the mortgagors cannot claim to redeem the property piecemeal. The integrity of a mortgage can be broken up only in the case of a mortgagee acquiring a portion of the mortgaged property—*Thakur Prosad v. Chandrika*, 11 O.L.J. 436, A.I.R. 1925 Oudh 150 (152), 81 I.C. 742.

This clause lays down that the indivisible character of a mortgage is broken up only when the mortgagee *acquires the share of a mortgagor*, and *not in any other manner*. Therefore, where the mortgagee allows the mortgagor to pay off a portion of the mortgage-debt and so releases a proportionate part of the mortgaged property, he does not thereby break up the mortgage so as to entitle the mortgagor or any one else interested in the property to redeem the remainder of the property piecemeal—*Ali Jan v. Majiduddin*, 45 All. 524 (525), A.I.R. 1923 All. 449; *Lachmi Narain v. Muhammad Yusuf*, 17 All. 63 (66); *Baldeo v. Jawahir*, 2 O.C. 344 (348).

But this rule was not followed in some cases. Thus, in a Madras

case, where the mortgagee allowed the mortgagor to redeem a portion of the mortgaged property, it was held that by so doing the mortgagee destroyed the indivisibility of the mortgage, and thereupon the purchaser of another portion of the property was entitled to redeem that portion only, and the mortgagee could not insist that the whole of the remaining property must be redeemed—*Subramanyan v. Mandayan*, 9 Mad. 453 (454). The Bombay High Court held that an owner of a part of the equity of redemption of mortgaged properties was entitled to redeem that portion when the mortgagee had acted in such a way as to release a portion of the properties from the mortgage-debt—*Mayashankar v. Burjorji*, 27 Bom.L.R. 1449, A.I.R. 1926 Bom. 31 (32). So also, where the three mortgagors made a partition of the property, by which each of them became entitled to a $\frac{1}{3}$ undivided share, and two of the mortgagors redeemed their two shares by paying $\frac{2}{3}$ of the mortgage-money, *held* that the other mortgagor must also be allowed to redeem his $\frac{1}{3}$ share, as the parties had severed their interests and the mortgagee had chosen to recognize that partition by allowing two of them to redeem their $\frac{2}{3}$ shares—*Lakshuman v. Madhav*, 15 Bom. 186. See also *Mahadaji v. Ganpatshet*, 15 Bom. 257. A Calcutta case expressed the view that if a portion of the property was released by the mortgagee, the mortgage should be treated as having been split up, and the release should be held to have the same effect as if the mortgagee has himself purchased that portion of the property—*Hari Kissen v. Veliat*, 30 Cal. 755 (757). The mortgage-debt could be always split up by consent, and on such splitting up, a mortgagee could sue one of the mortgagors for a proportionate part of the mortgage-debt, provided the burden of the mortgagor did not increase—*H. V. Lowe & Co v. Pulin Bihari*, 59 Cal. 1372, A.I.R. 1933 Cal. 154 (162); *Waleyatunnissa v. Chalakhi*, 10 Pat. 341, 132 I.C. 100, A.I.R. 1931 Pat. 164 (168). But this view has been disapproved of by the Legislature, and the object of inserting the word “only” in this para has been thus stated by the *Special Committee*:—

“The last paragraph of the section relates to what is known as the principle of the indivisibility or integrity of a mortgage. ‘Such integrity or indivisibility exists not only with reference to the mortgagee, who may be generally benefited thereby, but also with reference to the mortgagor. Save as a matter of special arrangement, neither the mortgagor, nor the mortgagee nor any person claiming through either of them should get relief except in consonance with the principle of indivisibility’ (22 Mad. 209, 212). We do not think it necessary to alter the last paragraph of the section except that the word ‘only’ should be inserted between the words ‘except’ and ‘where’ with a view to get rid of the effect of the decision in 27 Bom.L.R. 1449. The *only* case, therefore, when the integrity of a mortgage may be allowed to be broken, apart from special arrangement, is when a mortgagee acquires a share in the mortgaged property.”

60A. (1) *Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-trans-*

Obligation to transfer to third party instead of re-transference to mortgagor.

ferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

(2) *The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.*

(3) *The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.*

60B. *A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.*

Right to inspection
and production of documents.

Sections 60A and 60B have been added by section 23 of the Transfer of Property Amendment Act (XX of 1929).

"We have added, on the lines of sections 95 and 96 of the English Property Act, two new sections—sections 60A and 60B—to define the obligation of a mortgagee, when so required, to transfer the mortgage-debt to a third person named by the mortgagor, and also to make it clear that a mortgagor has a right to inspect and take copies of the documents of title relating to the mortgaged property which are in the possession of the mortgagee"—*Report of the Select Committee (1929).*

61. *A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage, made by him or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.*

Right to
redeem one
of two pro-
perties
separately
mortgaged.

61. *A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together,*

Right to
redeem
separately
or simul-
taneously.

Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

(Omitted).

Amendment:—This section has been redrafted by sec. 24 of the T. P. Amendment Act (XX of 1929) for the following reasons:—

“Section 61 abolished the doctrine of the consolidation of mortgages. The section was based on section 17 of the Conveyancing Act, 1881 (corresponding to section 93 of the Property Act, 1925). In England before that statute was enacted, and in this country before Act IV of 1882 was passed, a mortgagee was allowed to consolidate securities in his hands and force a mortgagor to redeem all of them or to prevent him from redeeming one of them without redeeming the others. [Ghose on Mortgage, 5th Edn., Vol. I, p. 429; 6 B.H.C.R. (A.C.J.) 90.] This was inequitable and was altered by section 61 of the Act. But even that section is not exhaustive. It is proposed therefore, that a mortgagor should be allowed to redeem simultaneously all debts or any one or more of them which have become due to the same mortgagee. The same principle ought to apply where portions of one and the same property are mortgaged separately. Accordingly, any reference to ‘property’ has been omitted and the words ‘two or more mortgages’ have been used and the illustration has been omitted.”—*Report of the Special Committee.*

377. Abolition of consolidation:—This section (both old and new) abolishes the consolidation of mortgages in this country in the same way as the Conveyancing Act (and recently the Property Act, 1925) has done in England. The doctrine of consolidation of mortgages over different properties was recognised by the Courts of India prior to the passing of this Act, and compelled the mortgagor who came to Court for redemption of a mortgaged property, to discharge *all* the debts due to the mortgagee and secured to him by mortgages on that or other property of the mortgagor. “If the owner of two or more different estates mortgaged them successively for distinct debts to the same person, the mortgagee had a right to insist that one security should not be redeemed alone, leaving him exposed to the risk of deficiency as to the others.... But Parliament intervened, and not a moment too soon, to put a stop to the flagrant injustice which was too often inflicted under the name of equity, and now in this country as well as in England, a mortgagee, in the absence of a contract to the contrary, cannot consolidate his securities”—Ghose’s *Law of Mortgage*, 5th Edn., pp 429. Thus, where two mortgages were executed with respect to six items of property, and a third mortgage was executed with respect to the same six items and also two other items, *held* that a decree which consolidated the amounts due under all the three mortgage-bonds, and made all the mortgaged properties liable for the consolidated amount, was contrary to the provisions of this section. Such a consolidation impedes the right of redemption of the mortgagor and is illegal—*Parmeshwar v. Raj Kishore*, 3 Pat. 829 (837), A.I.R. 1925 Pat. 59, 80 I.C. 34.

"A man may borrow money on the security of his property. The property may be worth much more than the amount borrowed, and both the lender and borrower may agree that the property is capable of serving as a security for further loans. In such circumstances, there is nothing to prevent the lender from making further advances to the borrower on the same security. If there is any such second loan on the security of the property, and the borrower repays *one of the loans*, the lender has nothing to lose. He can hold the property as security till the second and subsequent advance or advances are paid up."—*per* Mukerji J. in *Lallu v. Ram Nandan*, 52 All. 281 (F.B.), A.I.R. 1930 All. 136 (138), 124 I.C. 735.

The old section applied (as shown by the illustration and the marginal note), to cases where *different* properties were mortgaged, and not where the *same* property was mortgaged under several mortgages—*Balasubramania v. Sivaguru*, 21 M.L.J. 562, 11 I.C. 629; *Dorasami v. Venkateshaya*, 25 Mad. 108 (115). Therefore, a mortgagor seeking to redeem a mortgage on a property was not entitled to do so without paying the money due under a separate mortgage or charge relating to the same property—*Ramarayaningar v. Maharaja of Venkatagiri*, 50 Mad. 180 (P.C.), 31 C.W.N. 670, A.I.R. 1927 P.C. 32 (36) (overruling *Ramarayaningar v. Maharaja*, 44 Mad. 301); *Meloth Kannan v. Kodath Kannaran*, 1914 M.W.N. 231, 22 I.C. 609; *Ram Ratan v. Aditya*, 3 Luck. 459, 112 I.C. 481, A.I.R. 1928 Oudh 273 (276). Even a mortgagor could not redeem one mortgage on his property without at the same time paying off another mortgage or charge on the *same and other properties* as well—*Ganga Rai v. Kirtanath*, 33 All. 393; *Tajjobibi v. Bhagwan*, 16 All. 295; *Ramarayaningar v. Maharaja of Venkatagiri*, 50 Mad. 180 (P.C.). This view is no longer correct, because the present section has omitted all references to 'property' (see the Report of the Special Committee quoted above) and has thereby abolished consolidation of mortgages whether in respect of the *same* property or on different properties.

378. Covenant as to consolidation:—This section (both old and new) applies "*in the absence of a contract to the contrary*," so that the parties are left free to covenant among themselves that a mortgagor of two properties shall not redeem one property without redeeming the other. If the parties wish to lend their money or make further advances on the terms that one mortgage on the property shall not be redeemed until the money due on another mortgage is paid, they can easily effect that object by making it expressly a part of their contract—*Tajjobibi v. Bhagwan*, 16 All. 295 (299). Thus, where by each of two mortgages a separate property was mortgaged with possession and the second mortgage contained the clause: "and when the whole of the mortgage-money due under this deed together with the amount due under the previous deed shall be paid, then the mortgage shall be redeemable and the deed shall be taken back," *held* that the mortgagee was entitled to consolidate the two mortgages by the 'contract to the contrary'—*Jadu Rai v. Ram Birich*, A.I.R. 1922 All. 403, 70 I.C. 637. In *Ganga Bai v. Kirtanath*, 33 All. 393, however, such a covenant was not given effect to. But the circumstances of that case were peculiar; the properties in the two mortgages were partly identical and partly different; one of the mortgagors of the first mortgage did not join in the second mortgage; and the person who brought the suit for redemption of the prior mortgage was a pur-

chaser of one of the properties mortgaged and had no interest in the property comprised in the second mortgage.

Where after the execution of a mortgage-bond in favour of the mortgagee, the mortgagor takes further advances and executes a fresh bond creating a charge on the property, and in that bond he stipulates that he will not redeem the earlier mortgage without paying off the money due under the subsequent bond, *held* that the mortgagor, according to the terms of the contract, will not be entitled to redeem the earlier mortgage without paying off the subsequent charge. The covenant in the subsequent bond will not be treated as a clog on redemption—*Ranjit Khan v. Ramdhan*, 31 All. 482; *Brij Lall v. Bhawani*, 32 All. 651; *Har Prasad v. Ram Chandar*, 44 All. 37 (42) (F.B.), A.I.R. 1922 All. 174; *Jagannath v. Jaipal*, 55 All. 359 (F.B.), A.I.R. 1933 All. 257 (258), 142 I.C. 410; *Shib Narain v. Gajadhar*, 48 All. 292, A.I.R. 1926 All. 506, 92 I.C. 772; *Lal Bahadur v. Rameshwar*, 3 Luck. 113, A.I.R. 1927 Oudh 510 (511); *Ram Ratan v. Aditya*, 3 Luck. 459, 112 I.C. 481, A.I.R. 1928 Oudh 273 (276), affirmed, *Aditya v. Ram Ratan*, 5 Luck. 365 (P.C.), 57 I.A. 173, 34 C.W.N. 625 (627), 59 M.L.J. 342, 28 A.L.J. 646, 123 I.C. 191, A.I.R. 1930 P.C. 176; *Janardan v. Anant*, 32 Bom. 386 (390). Such a covenant will be enforceable even against a subsequent transferee of the equity of redemption—*Gaya Prasad v. Jagannath*, *supra*. So also, where three successive mortgages were specifically charged on the same land and there was an express stipulation in the second mortgage that the first mortgage should not be redeemed without discharging the second mortgage, and in the third mortgage there was a stipulation that the mortgagor would pay the amount of that mortgage before discharging the earlier debts, *held* that the mortgagor was not entitled to redeem the first mortgage without at the same time discharging the second, and that the third mortgage must be discharged before or simultaneously with the redemption of the first—*Shib Narain v. Gajadhar*, 48 All. 292; *Punnu Ram v. Ghulam Hussain*, 7 Lah. 297, 96 I.C. 630, A.I.R. 1926 Lah. 494. "It is a settled rule of equity that a mortgagee, whether his security is legal or equitable, shall not be deprived thereof without payment of all sums of money due to him from the mortgagor which form a general or special lien on the land; and therefore if the mortgagee advances other sums of money to the mortgagor expressly by way of further charge, thereby creating a specific lien, or on a judgment, whereby an actual charge is created, or on statute, thereby creating a general lien, neither the mortgagor nor generally speaking any one claiming under him, though for valuable consideration and without notice, is allowed to redeem without payment of the full amount advanced."—Coote's *Law of Mortgage*, 8th Edn., Vol. II, p. 1175.

So also, a covenant in a subsequent mortgage or charge not to redeem that mortgage or charge without redeeming a prior mortgage created in respect of the same property is enforceable, and is not to be regarded as a clog on redemption—*Jugesri v. Aftab Chand*, 8 Pat. 68, 10 P.L.T. 41, A.I.R. 1928 Pat. 582 (584); *Imam Baksh v. Anwari Begam*, 18 I.C. 718 (All.); *Har Govind v. Tula Ram*, 10 I.C. 222 (All.); *Abdul Hamid v. Jairaj*, 3 A.L.J. 768.

In order to enable the mortgagee to compel the mortgagor to redeem both the mortgages at one time, it is necessary that the mortgages should be *enforceable* (by the mortgagee) *i.e.*, not barred by limitation. Therefore, if at the date of redeeming the prior mortgage it is found that a

suit on the subsequent mortgage if brought by the mortgagee would have been barred by limitation, the mortgagor will be entitled to redeem the earlier mortgage only, without paying any money due on the subsequent mortgage—*Kesar Kunwar v. Kashiram*, 37 All. 634. Thus, a usufructuary mortgage was executed in 1867; subsequently a simple mortgage was granted in respect of the same property in 1873. In 1914, the mortgagor brought a suit to redeem the usufructuary mortgage. The mortgagee insisted on the simple mortgage also being redeemed at the same time. *Held* that since a suit for money on the simple mortgage if brought by the mortgagee in 1914 would have been barred by limitation, the mortgagor could not be compelled to pay the amount of the simple mortgage before redeeming the usufructuary mortgage and getting possession—*Ram Krishna v. Nekkar*, 33 M.L.J. 581, 43 I.C. 286; *Kesar Kunwar v. Kashi Ram*, 37 All. 634.

Moreover, in order that the covenant as to consolidation may be enforced, it is necessary that both the prior and subsequent mortgages have been created in favour of the *same* person; otherwise the covenant will not be enforceable. Thus, one N mortgaged his property to defendants 1, 2, 3 and 4 who traded as a firm. Subsequently he gave a second mortgage of the same property to defendant no. 2 alone for a loan advanced by him personally. The second mortgage-deed contained a stipulation that the debt due thereunder must be paid off before the prior mortgage-debt. *Held* that the subsequent mortgage-debt in the second defendant's favour being a personal one, in his *individual* capacity, he cannot insist on his being paid before redemption of the prior mortgage created in favour of the *firm*—*Chhotalal v. Mathur*, 18 Bom. 591.

Covenant must be express:—A covenant as to consolidation of mortgages must be express and unequivocal. As consolidation has the effect of interfering with the mortgagor's right to redeem a mortgage on one property without redeeming another, the law always regards consolidation as inequitable and a Court of justice will always struggle against an interference with the mortgagor's right unless the covenant is clear and unequivocal—*Jiwandas v. Theraj*, 1 Lah. 105, 55 I.C. 509; *Bhartu v. Dalip*, 3 A.L.J. 672 (674).

379. Covenant as to consolidation of unsecured debts:—If a mortgagor, after executing a mortgage, takes a subsequent loan from the mortgagee under a *simple money-bond*, and in that bond stipulates that he will not redeem the mortgage without paying off the subsequent loan, the stipulation cannot be enforced; because the simple money-bond does not create any charge on the property, and the covenant in the bond will be treated as one placing an unnecessary hindrance in the way of the mortgagor (*i.e.*, a clog on redemption) and therefore unenforceable; the mortgagor (or a purchaser of the equity of redemption) will be entitled to redeem the mortgage without paying off the amount due under the money-bond—*Sheo Shankar v. Parma Mahton*, 26 All. 559; *Lallu v. Ram Nandan*, 52 All. 281 (F.B.), 124 I.C. 733, A.I.R. 1930 All. 136 (149); *Rama v. Martand*, 9 Bom. 236 (Note); *Rajmal v. Shivaji*, 27 Bom. 154 (156) (doubting *Hari v. Balambhat*, 9 Bom. 233); *Durga Prasad v. Dukhi Roy*, 9 C.W.N. 789; *Unni v. Nagammal*, 18 Mad. 368; *Jang Bahadur v. Mata Din*, 46 I.C. 80, 5 O.L.J. 159; *Rugad Singh v. Sat Narain*, 27 All. 178; *Kandhaiya v. Ram Charitar*, 85 I.C. 328, A.I.R. 1925 Oudh 593 (594). Such bye-agreements to pay unsecured debts as a con-

dition precedent to redeeming a mortgage are inconsistent with the recognised principles of the law of mortgage, irrespective of the question whether they amount to clog on redemption; they are inconsistent with the general principles of justice, equity and good conscience—*Lallu Singh v. Ram Nandan*, 52 All. 281 (F.B.), 1930 A.L.J. 156, 1930 All. 136 (150), 124 I.C. 733. In England also the law is the same. "The general principle governing the question as to when a mortgagee will be allowed to charge further advances in account appears to be that such advances must have been made on the faith of an actual *charge* on the land, and not on merely *personal security*."—Coote's *Law of Mortgage*, 8th Edn., Vol. II, page 1175. And so Dr. Ghose observes in his learned work: "To say that a mortgagee may not foreclose for anything beyond the debt on his security but that a mortgagor must pay, as the price of redemption, *unsecured* debts due to the mortgagee as well as the mortgage-debt, is not only to violate a homely English proverb, but also to postulate something that is not true, namely, that redemption is not a right of the mortgagor but a mere favour shown to him."—*Law of Mortgage*, 5th Edn., p. 242. The question as to whether the subsequent deed creates a further mortgage or charge on the property or merely amounts to a simple bond creating a personal liability, is to be decided with reference to the terms of the deed. See *Lallu v. Ram Nandan*, (supra); *Aditya v. Ram Ratan*, 5 Luck. 365 (P.C.), 34 C.W.N. 625 (627); *Kandhaiya v. Ram Charitar* (supra); *Ashraf Ali v. Chandrapal* (supra); *Gaya Prasad v. Rachpal*, 9 O.L.J. 484, 70 I.C. 66, A.I.R. 1923 Oudh 24; *Ramadhin v. Sitla*, 17 O.C. 303, 25 I.C. 905.

Prior to the passing of the T. P. Act, no distinction was made between secured and unsecured debts, and a mortgagor was not allowed to redeem a prior mortgage without clearing off the subsequent debts, even though such subsequent advances were unsecured—*Allu Khan v. Roshan Khan*, 4 All. 85 (explained in 26 All. 559); *Hari v. Balambhat*, 9 Bom. 233 (235); *Krishnaji v. Maheshvar*, 20 Bom. 346 (347); *Hiralal v. Narsilal*, 11 Bom.L.R. 318, 2 I.C. 469 (471). But even after the passing of the T. P. Act, it has been held in certain Oudh cases that redemption of the mortgage cannot be allowed without payment of the money due under a subsequent simple bond—*Raisunnissa v. Zorawar*, 1 Luck. 92, A.I.R. 1926 Oudh 228; *Gaya Prasad v. Rachpal*, 9 O.L.J. 484, A.I.R. 1923 Oudh 24, 70 I.C. 66. This view is opposed to the trend of recent case law, and can hardly be regarded as correct. See Ghose's *Law of Mortgage*, p. 242.

But if the *prior debt is unsecured*, and the *subsequent debt secured*, i.e., if after the execution of a simple money bond the debtor executes a mortgage of his property and in that mortgage-bond he stipulates not to redeem the mortgage without paying off the debt under the earlier simple bond, *held* that the covenant will be enforced because in such a case the mortgage will be regarded as securing not only the money due under it but the earlier debt as well; that is, the stipulation in respect of the earlier debt constitutes a part of the transaction of the mortgage—*Hari v. Vishnu*, 28 Bom. 349 (361) (F.B.). The prior debt on the simple money-bond may not strictly speaking be a *charge* on the land, but the equity of redemption is made *conditional on the payment* of both the debts; and the mortgagor cannot redeem the mortgage without paying off the prior debt—*Yashvant v. Vithoba*, 12 Bom. 231 (234). And the result is the same if the secured and unsecured debts are *contemporaneous*. See *Sundar v. Bapuji*, 18 Bom. 755 (757). In this case, the covenant as to

payment of the contemporaneous unsecured debt was enforced even though the debt was *barred* at the time of the suit for redemption of the mortgage.

Covenant cannot be enforced against mortgagor's assignee:—In the case of a covenant in the mortgage to pay an *unsecured* debt, the assignee of the equity of redemption is entitled to redeem without paying the unsecured debt which the original mortgagor had contracted to pay along with the mortgage amount—*Unni v. Nagammal*, 18 Mad. 368. "It may be safely affirmed, whatever may be the liability of the mortgagor himself, that neither justice nor equity nor the rescripts of the Emperor Gordian can prevent an *assignee* of the equity of redemption from redeeming the mortgage on payment only of the secured debt"—Ghose's *Law of Mortgage*, 5th Edn., p. 242. The contrary view taken in *Allu Khan v. Roshan Khan*, 4 All. 85 (which was decided prior to the passing of the T. P. Act) is no longer good law.

Invalid charge:—An invalid charge stands on the same footing as an unsecured debt. Consequently, the mortgagor cannot be compelled to pay off the debts created by a subsequent invalid charge, as a condition of redemption of the prior mortgage—*Lallu Singh v. Ram Nandan*, 52 All. 281 (F.B.), 1930 A.L.J. 156, A.I.R. 1930 All. 136 (149), 124 I.C. 733.

380. Conditional covenants:—A deed of subsequent mortgage contained a stipulation that the mortgagor could not redeem the earlier mortgage until the money due on the previous mortgage was first paid. There was an additional covenant allowing redemption independently of the previous mortgage, if the money due under the subsequent mortgage was paid within a certain period. *Held* that the mortgagor could redeem the subsequent mortgage, independently of the earlier mortgage, if he paid the amount due under the subsequent mortgage within the stipulated period; but in default of payment within the period fixed, the two mortgages must be redeemed at one time—*Suraj Balli v. Ram Dular*, 6 O.L.J. 147, 50 I.C. 897. Such a covenant can be enforced not only against the mortgagor but also against his transferee—*Ibid*.

Similarly, where a property was mortgaged for Rs. 1,500 and the mortgage-deed recited an earlier debt of Rs. 5,000 due on a previous account and provided that if the mortgagor did not repay this Rs. 5,000 within two years from the date of the deed, he was not at liberty to redeem the property unless both the debts of Rs. 1,500 and Rs. 5,000 were paid, and the suit for redemption was brought after the expiry of 2 years, *held* that the charge as to Rs. 5,000 took effect on the expiry of two years from the date of the mortgage-deed; that is, after the expiry of two years, the property must be deemed to be mortgaged for Rs. 5,000 as well as Rs. 1,500; but before that period the debt of Rs. 5,000 was merely personal; and if the mortgagor had brought his suit for redemption before that date, he could have redeemed the mortgage by paying Rs. 1,500 only—*Hari v. Vishnu*, 28 Bom. 349 (358, 360) (F.B.).

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property—

Right of usufructuary mortgagor to recover possession.

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property, *together*

Right of usufructuary mortgagor to recover possession.

with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee—

(a) Where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property—when such money is paid:

(a) Where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property—when such money is paid:

(b) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money—when the term (if any) prescribed for the payment of the mortgage-money has expired, and the mortgagor pays or tenders to the mortgagee the principal money, or deposits it in Court as hereinafter provided.

(b) where the mortgagee is authorised to pay himself, from such rents and profits *or any part thereof, a part only of the mortgage-money*—when the term (if any) prescribed for the payment of the mortgage-money has expired, and the mortgagor pays or tenders to the mortgagee *the mortgage-money or the balance thereof*, or deposits it in Court as hereinafter provided.

Amendment:—This section has been amended by sec. 25 of the Transfer of Property Amendment Act (XX of 1929).

“Together with . . . mortgagee”:—“In order to make section 62 comprehensive, we have on the lines of section 60 provided that the mortgagor has a right to require the mortgagee to deliver back the title-deeds and other documents relating to the mortgaged property”—*Report of the Select Committee (1929)*.

In clause (b) the italicised words have been substituted for the following reasons:—

“Section 62 which relates to a usufructuary mortgage requires to be amended on the same lines as section 58 (d).”

“Clause (b) of the section is limited to a case where out of the rents and profits of the mortgaged property the mortgagee is entitled to recover only the interest due to him on his principal. The clause should also be made applicable to cases where the rents and profits are to be appropriated in payment of a part of the mortgage-money, i.e., in payment of either interest in part or principal in part or both in part. To effect this change, the words ‘principal money’ should be changed into ‘the balance of the mortgage-money.’”—*Report of the Special Committee*.

381. Scope and application:—This section should be read as supplemental to sec. 60. That section lays down the general rule that a mortgagor intending to redeem the mortgage must pay or tender the mortgage money, but as a formal payment or tender is out of the question in

a usufructuary mortgage where both the principal and interest are to be satisfied out of the usufruct (*Het Singh v. Behari Lal*, 43 All. 95) the present section specifically provides that the mortgagor will be entitled to recover possession as soon as the mortgage-money is so satisfied (clause *a*), and where a part of the mortgage-money is payable out of the usufruct, the mortgagor may redeem on payment or tender of the balance of the mortgage-money (clause *b*). Prior to the amendment of this section it was held that this section did not apply to cases where from the conditions contained in the mortgage, *accounts* had to be made up between the parties—*Zahid Ali v. Kedar*, 17 O.C. 388, 27 I.C. 427 (428). This ruling would now apply only to clause (*a*) which presupposes a case in which there would hardly be any need for elaborate accounts, but not to clause (*b*) which, as now amended, involves a more elaborate accounting, except in cases where the rents and profits are to be taken in complete satisfaction of the interest.

It has been held in an Oudh case that this section contemplates the existence of only *one* transaction and does not at all touch the case where a usufructuary mortgage having been executed, *other mortgages* by way of further charges have been executed by the same mortgagor. And so where a usufructuary mortgage was followed by a deed of further charge to secure a subsequent advance, and the deed stipulated that the mortgagor could not get redemption of the usufructuary mortgage without paying off the amount due under the deed, it was held that sec. 62 did not apply, and that the mortgagor was not entitled to recover possession without paying off the sums due under the subsequent deed—*per Lindsay J. C.* in *Zahid Ali v. Kedar Nath*, 17 O.C. 388, 27 I.C. 427 (429). But this view, it is submitted, is not correct, because the learned Judicial Commissioner failed to notice that this section contains no such words as “in the absence of a contract to the contrary” (which are to be found in sec. 61); so that this section would apply *even if there is a covenant* in the deed of further charge that the mortgagor will not be entitled to redeem the usufructuary mortgage without paying off the sum due under the deed. Such a covenant cannot prevent the mortgagor from exercising the express statutory right to recover possession, conferred by sec. 62, on payment (or satisfaction by usufruct) only of the debt due under the usufructuary mortgage. In other words, the right given by sec. 62 is *absolute*, notwithstanding any covenant to the contrary. Niamatullah, J. in his dissentient judgment in *Lallu v. Ram Nandan*, 52 All. 281 (F.B.), A.I.R. 1930 All. 136 (157), 124 I.C. 735, followed the Oudh case and read into this section the words “in the absence of a contract to the contrary.” This is unwarrantable, for had it been the intention of the Legislature, they might have easily inserted these words into the section, as they have done in sec. 61.

A fortiori, where the agreement creating a further charge contains *no covenant* to the effect that the usufructuary mortgage shall not be redeemed unless the charge is paid off, the mortgagor is entitled to redeem the usufructuary mortgage and recover possession under this section independently altogether of any consideration of the further charge. If there is any money due under the further charge, the mortgagee may seek to enforce the hypothecation by a separate suit, but he is not entitled, in the mortgagor's suit for redemption of the usufructuary mortgage, to claim that as a condition precedent to redemption the mortgagor must pay

the money due under the further charge—*Khuda Bakhsh v. Alimunnissa*, 27 All. 313 (316, 318, 319).

If a mortgagor, after creating a usufructuary mortgage, takes further advances by way of simple mortgage or charge or personal covenant, he can recover possession of the property upon payment of the money due only under the usufructuary mortgage, and the lender cannot say that he would retain possession till the further advances have been paid up. But if the further advances are also secured by way of *usufructuary* mortgages over the property originally mortgaged, *i.e.*, where successive deeds of mortgage with possession over the same property are executed (which, in practice, are rare), the mortgagor can redeem the first mortgage without discharging the second or subsequent mortgages, though he will *not be entitled to recover possession* by reason of the existence of the second or subsequent mortgages with possession. The first mortgage will be *redeemed, without recovering possession*. In these circumstances, if the mortgagor wants to *take possession* of the property, he must pay not only the amount secured by the first mortgage, but also the amounts secured by the second or subsequent usufructuary mortgages—*Lallu Singh v. Ram Nandan*, 52 All. 281 (F.B.), 1930 A.L.J. 156, A.I.R. 1930 All. 136 (139, 157), 124 I.C. 735. In a recent Privy Council case, where a usufructuary mortgagor borrowed a further sum from the mortgagee by executing a document which created a further charge on the property, and the document recited that the mortgagor would not redeem the usufructuary mortgage without payment of the amount borrowed under the subsequent document, it was held that the mortgagor was not entitled to redeem the usufructuary mortgage without payment of the subsequent debt—*Aditya v. Ram Ratan*, 5 Luck. 365 (P.C.), 34 C.W.N. 625 (627), A.I.R. 1930 P.C. 176, 123 I.C. 191. In this case the relevant sections of the T. P. Act were not specifically referred to as the transaction took place in 1881; prior to the passing of this Act, but the case was decided on general principles underlying the Act regarding covenant as to consolidation of mortgages (see Note 378 under sec. 61).

This section applies to a usufructuary mortgage, pure and simple, and not to an anomalous mortgage or a combination of simple and usufructuary mortgage, *e.g.*, where the usufructuary mortgagee grants a lease of the property to the mortgagor, and the payment of the rent reserved is a charge on the property. In such a case the mortgagor cannot redeem the mortgage upon payment only of the mortgage-money, but must also pay the amount due under the lease—*Ramarayanimgar v. Maharaja of Venkatagiri*, 50 Mad. 180 (P.C.), 31 C.W.N. 670, A.I.R. 1927 P.C. 32 (36). But the Allahabad High Court applied this section to an exactly similar case; see *Khuda Bakhsh v. Alimunnissa*, 27 All. 313 (318, 319), where it was held that the lease-deed executed by the mortgagor was not a part of the mortgage but was an *independent* transaction; consequently the two could not be combined, and the usufructuary mortgagor was entitled to redeem the mortgage, without paying the arrears of lease-money.

382. Clause (a)—Satisfaction of the mortgage-money out of the usufruct:—Where the mortgagee is asked to pay himself the principal and interest out of the rents and profits of the mortgaged property, the general rule is that the mortgagee is entitled to remain in possession till the mortgage debt is wiped off from the rents and profits of the property

—*Narasimha v. Seshayya*, 48 M.L.J. 363, A.I.R. 1925 Mad. 825 (826), 90 I.C. 138.

Clause (a) contemplates a case in which the transaction is a *vivum vadium* in which *no time is fixed* for payment and the mortgage-deed provides for the mortgagee paying himself the debt (with interest) from the rents and profits of the estate—*Tirugnana v. Nallatombi*, 16 Mad. 486 (488). In such a case the mortgaged property can be recovered immediately after the discharge of the mortgage-debt by means of the rents and profits of the property. And the same rule is to be applied even though *a term of years is fixed*. This clause embodies the principle that in no case can the mortgagee retain possession after the debt itself is discharged from the usufruct—*Seshayya v. Lakshminarasimha*, 57 M.L.J. 800, A.I.R. 1930 Mad. 160 (162), 124 I.C. 282. If a time is fixed, the time is not of the essence of the transaction but should be regarded as a protection for the debtor, and the mortgagor is entitled to recover possession before the fixed period, on his showing that the principal and interest have been wholly discharged by the usufruct before the stipulated period—*Kundan v. Thakurlal*, 6 C.P.L.R. 43. Even if the usufructuary mortgage-deed *expressly* provides that the mortgagee will be entitled to remain in possession for 12 years notwithstanding that the mortgage-debt is satisfied out of the property before the expiry of the term, *held* that the mortgagor will be entitled to recover possession before that period as soon as the mortgage-debt is satisfied out of the usufruct, and the provision is unenforceable as it fetters the right of redemption—*Ankinedu v. Subbiah*, 35 Mad. 744 (748). Even a special agreement to the effect that the mortgagee shall remain in possession until the payment of the debt is made in one lump sum does not prevent the mortgage from being at an end whenever the mortgagee has realised both the principal and interest out of the usufruct—*Jaijit Rai v. Govind*, 6 All. 303. A usufructuary mortgagee has no right to remain in possession of the mortgaged property after the mortgage-money is satisfied from the usufruct, even though the parties may have wrongly calculated that the liquidation of the mortgage-money from the usufruct shall take a longer period and may have said so in the deed—*Prag v. Mohanlal*, 5 O.L.J. 263, 47 I.C. 161.

This clause provides for cases in which no term is fixed and the whole of the mortgage-money is stipulated to be recovered out of the rents and profits; in such cases the mortgagor can recover the property only when the mortgage-money has been satisfied out of the usufruct, and not in any other mode, *e.g.*, *cash payment* by the mortgagor. The words “when the money is paid” mean “when the money is paid out of the rents and profits” and do not include a payment by the mortgagor—*Tirugnana v. Nallatombi*, 16 Mad. 486 (488); *Seshayya v. Lakshminarasimha*, *supra*; and the mortgagee can claim to retain possession until the discharge of the debt out of the usufruct. Until the debt is discharged in that manner, the mortgagor’s suit to recover possession even by cash payment is premature—*Tirugnana v. Nallatombi*, 16 Mad. 486 (488, 490). In this case, when the mortgagor sued to recover the property it was found on taking accounts that the mortgage-money had not been satisfied out of the usufruct, and so it was held that the mortgagor’s right of redemption had not yet accrued. But in an exactly similar case, the Oudh Chief Court allowed the mortgagor to recover the property on payment of the balance found due to the mortgagee on taking accounts—*Hardeo v. Dy. Com-*

missioner, 1 Luck. 367, A.I.R. 1926 Oudh 281 (285), 98 I.C. 542; no reference was made to sec. 62, but the Judges merely followed the obsolete rulings of 10 All. 602 and 23 Mad. 33 (cited in Note 359 under sec. 60). A similar order was made in *Gopal Singh v. Karan Singh*, 17 O.C. 218, 25 I.C. 302 (304), but the terms of the mortgage in this case were somewhat different.

If the mortgage-deed provides for the payment of *interest* or a part of the mortgage-money only out of the usufruct, the mortgagor will be entitled to redeem by cash payment of the principal. See clause (b).

383. Clause (b):—This clause lays down that when possession is given to the mortgagee, and he is asked to pay himself the interest on the mortgage-amount from the rents and profits of the mortgaged property, and a *term is fixed* in the usufructuary mortgage-deed, the mortgagee is entitled to remain in possession *till the close of the term*, unless there be a clause in the mortgage-deed itself enabling the mortgagor to redeem the mortgage at any time he chooses. If there is a balance left after satisfying the interest or part of the mortgage-money, the mortgagee should pay the balance to the mortgagor; if he does not pay it to the mortgagor, he is bound to apply it in further reduction of the principal. But he is not bound to accept the mortgage amount from the mortgagor if he tenders it *before the expiry* of the term of the mortgage. See *Narasimha v. Seshayya*, 48 M.L.J. 363, A.I.R. 1925 Mad. 825 (826), 90 I.C. 138.

Clause (b) lays down that if it is stipulated in the mortgage-deed that the interest alone will be satisfied out of the usufruct, the mortgagor will be able to redeem on payment only of the *principal money*. Thus, where on the same day on which a usufructuary mortgage deed is executed the mortgagee executes a lease under which the mortgagor becomes a tenant of the mortgagee and is to pay rent in lieu of interest, the mortgagee takes the chance of the rent being greater or less than the interest reserved in the mortgage bond, and the mortgagor will be entitled to redeem on payment of the principal sum only—*Partab Bahadur v. Gajadhar*, 24 All. 521 (P.C.). Where under a usufructuary mortgage (in which the interest was to be satisfied out of the usufruct) the mortgagee was placed in possession but shortly after was dispossessed of a portion of the mortgaged property by a person holding a superior title or in pursuance of a decree, and the *mortgagee acquiesced* in such dispossession, *held* that the mortgagor was entitled to redeem on payment of the principal money only, and the mortgagee could not claim anything from the mortgagor on account of rents and profits in respect of the property of which he was dispossessed—*Partab Bahadur v. Gajadhar*, 24 All. 521 (P.C.); *Khuda Buksh v. Ali-munnissa*, 27 All. 313; *Jhunku v. Chhotkan*, 31 All. 325; *Dubri v. Ram Naresh*, 3 O.W.N. 176, A.I.R. 1926 Oudh 224, 93 I.C. 297.

Deposit in Court:—See sec. 83.

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee, to such accession,

Accession to mortgaged property.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture, or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, *with interest at the same rate as is payable on the principal, or where no such rate is fixed, at the rate of nine per cent. per annum.*

In the case last mentioned, the profits, if any, arising from the accession, shall be credited to the mortgagor.

Where the mortgage is usufructuary, and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession, shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

Amendment:—By section 26 of the T. P. Amendment Act (XX of 1929), the italicised words have been substituted for “at the same rate of interest” in the second para. The *Special Committee observes*:—

“Section 63 relates to accessions and the second paragraph of the section provides for the payment of the costs of accessions by the mortgagor where such accessions are made in certain circumstances and are delivered to the mortgagor. It is stated that the proper cost payable by the mortgagor is to be added to the principal money ‘at the same rate of interest’. Nothing is stated in the section about any rate of interest. Difficulty might also arise where a mortgage-deed is silent as to the rate of interest. For the words ‘at the same rate’ the following words should be substituted, *viz.*:—

‘at the rate of interest payable on the principal, and, where no such rate is fixed in the mortgage-deed, at the rate of nine per cent. per annum’.”

384. Principle:—This section is an illustration of the maxim “*Accessio cedit principali*” (the increase follows the principal). It may be compared with sec. 90 of the Indian Trusts Act which enacts as follows:—“Where a tenant for life, co-owner, mortgagee, or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner as representing all persons interested in such property gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.”

The general principle, well recognised in England, is that any acquisitions by the mortgagee are treated as accretions to the mortgaged property, and therefore subject to redemption—*Maheshwar v. Babu Ram*, 2 P.L.T. 225, 60 I.C. 308 (309). The principle recognised by English law is that most acquisitions by a mortgagor enure for the benefit of the mortgagee (see sec. 70); and, on the other hand, many acquisitions by the mortgagee are, in like manner, treated as accretions to the mortgaged property or substitutions for it, and therefore subject to redemption—*Kishendat v. Mumtaz Ali*, 5 Cal. 198 (210) (P.C.).

Accession:—Where a usufructuary mortgagee brought to sale certain holdings of tenants for arrears of rent under the Madras Rent Recovery Act, ejected the tenants and obtained possession of the holdings, *held* that these holdings were accessions to the mortgaged property—*Vencatachariar v. Srinivasa Aiyangar*, 4 I.C. 357 (358). Where a usufructuary mortgagee obtained a mortgage by conditional sale of a holding of a tenant, got a decree for foreclosure of the holding and in execution thereof obtained possession of the holding, *held* that the tenancy plot was an accession to the mortgaged land—*Ketki v. Dinabandhu*, 10 C.L.J. 83, 3 I.C. 395 (396); *Mohanlall v. Chaodhry Pulandar*, 14 C.P.L.R. 169. Large extensions into waste adjoining lands cannot be regarded as accessions. But if an extension is recent and of small area in comparison with the mortgaged land, it may be treated as an accession—*Tha Dun v. The Zan*, 4 Bur.L.T. 167, 11 I.C. 808 (809). But Government waste lands adjoining the mortgaged property which are brought under cultivation by the mortgagee do not come within the category of an accession within the meaning of this section—*Maung Shwe v. Ponniah*, 1 Bur.L.T. 262, A.I.R. 1923 Rang. 127, 82 I.C. 787.

A tree falling down on the ground by natural causes is not an accession to the mortgaged property, as there is no addition to the property. The fall of a tree is like the maturing of a harvest; its fall makes it come into the position of a profit, and the person in possession takes that profit—*Durga Shankar v. Ganga*, 1932 A.L.J. 493, A.I.R. 1932 All. 500 (502).

Accession must take place during the mortgage:—For the purposes of this section as well as of sec. 70, the accession to the mortgaged property must take place before the mortgage becomes extinguished—*Kapniah Sivananjiah v. Sithay Goundan*, 41 M.L.J. 490, A.I.R. 1921 Mad. 627, 70 I.C. 367. Where the usufructuary mortgagee of a share in a village took a mortgage by conditional sale of a holding of a tenant, and after the expiry of the usufructuary mortgage got a decree for foreclosure of the holding, and in execution obtained possession thereof, *held* that the acquisition of the tenancy plot must be deemed to have taken place during the continuance of the mortgage of the village, and the fact that the foreclosure decree which gave actual possession of the tenancy plot to the mortgagee was passed *after* the termination of the usufructuary mortgage did not affect the case. The mortgagor was entitled to take the accession upon payment, in addition to the mortgage-money, of the costs of acquiring the holding—*Ketki v. Dinabandhu*, 10 C.L.J. 83, 3 I.C. 395 (396); *Mohanlall v. Chaodhry Pulandar*, 14 C.P.L.R. 169.

385. Acquired accessions:—The second para deals with *acquired* accessions, *i.e.*, accessions made at the expense of the mortgagee. These are divided into two classes—(1) accessions capable of severance from the principal; the mortgagor according to his option may or may not

redeem them along with the principal, but if he desires to take them, he must pay to the mortgagee the expenses of acquiring them—*Khudadad v. Girdhari*, 163 P.W.R. 1917, 42 I.C. 468; (2) accessions incapable of severance from the principal; these *must* be delivered by the mortgagee to the mortgagor along with the principal; but the mortgagor is bound to pay for them only when they are necessary for the preservation of the principal property, or when they were made with his consent.

386. Accessions acquired by mortgagee:—It has been held in some cases that a mortgagor can claim the accession if it was acquired by the mortgagee *in his capacity as mortgagee*. (Compare the words “by availing himself of his position as such” in sec. 90 of the Indian Trusts Act, cited in Note 384 above). A mortgagee who has acquired what any stranger or even the mortgagor himself could have acquired equally well despite the mortgage, cannot be compelled to hand over his acquisition to the mortgagor. Therefore, it is competent to a mortgagee, during the continuance of the mortgage, to purchase an absolute occupancy tenure for himself and to treat it as his separate property after the mortgage comes to an end—*Girdhari v. Muhammad Karmdad*, 63 P.R. 1918, 44 I.C. 266. When the estate mortgaged is a Zemindari out of which a *patni* tenure has been granted or within the ambit of which there is an ancient *mokurari istemrari* tenure, a mortgagee of the Zemindari with possession can purchase that *patni* or *mokurari* with his own funds and keep it alive as a separate property for his own benefit. In such a case the mortgagee can hardly be said to have derived from the mortgagor any peculiar means or facilities for making the purchase which would not be possessed equally by a stranger, and he may therefore be held, equally with a stranger, to make it for his own benefit—*Kishen Dutt v. Mumtaz Ali*, 5 Cal. 198 (204) (P.C.). This section does not entitle the mortgagor to recover acquisitions (*e.g.*, occupancy rights) made by the mortgagee for his own benefit under circumstances which do not bring him within 90, Trusts Act, *i.e.*, when he did not have any special advantage by reason of his position as mortgagee in acquiring them—*Sorabjee v. Dwarkadas*, 36 C.W.N. 947 (953) (P.C.), 138 I.C. 557, A.I.R. 1932 P.C. 199. It cannot be affirmed that every purchase by a mortgagee must be regarded as an accession to the mortgaged property. If it appears that by reason of his position as mortgagee in possession, he has had peculiar facilities for acquiring the properties in question, such properties should be regarded as an acquisition to the mortgaged property. If, on the other hand, it appears that in regard to such acquisitions the mortgagee in possession is in the same position as any third person, then the properties so acquired should not be regarded as an accretion to the mortgaged property—*Moghab Pande v. Ragho Pande*, 10 P.L.T. 865, 118 I.C. 314, A.I.R. 1929 Pat. 730. The question whether a property acquired by a mortgagee in possession is an accretion to the mortgaged property or not depends upon the *intention* of the mortgagee which has to be found from a careful appreciation of the entire facts and circumstances of each case—*Moghab Pande v. Ragho*, *supra*; *Maheshwar v. Babu Ram*, 2 P.L.T. 225, 60 I.C. 308 (310). If it appears from the evidence that the mortgagee, instead of merging the acquisitions in the mortgaged property, kept them distinct and apart from it for his own benefit, they should be treated as his own property and the mortgagor was not entitled to claim them on redemption—*Maheshwar v. Babu Ram*, 2 P.L.T. 225, A.I.R. 1921 Pat. 59, 60 I.C. 308 (309). Where

the mortgagee in possession purchased certain occupancy holdings which were transferable only by custom and could not be obtained by strangers, it must follow that the mortgagee could only have acquired them by reason of his position as a mortgagee in possession and not otherwise, and therefore the holdings formed part of the mortgaged property and liable to redemption along with it—*Moghab Pande v. Ragho Pande*, supra.

On the other hand, the Calcutta High Court holds that this clause applies to all cases whether the mortgagee makes the accessions (at his expense) either as mortgagee or in *any other capacity*. Thus, where the plaintiff's share in a mehal was mortgaged to the co-proprietor of the mehal, and the mortgagee purchased some of the raiyati holdings of the mehal from the tenants and obtained possession thereof, *held* that on redemption of the mortgage the plaintiff was entitled to get *khas* possession of the holdings to the extent of his share in the mehal, on payment to the mortgagee of the proportionate share of the expenses incurred by him in acquiring them. The purchases were accessions to the mortgaged property within the meaning of this section. The mortgagor's right to the accessions does not depend upon whether the mortgagee had any special advantage by virtue of his position as mortgagee in acquiring the accessions. This section applies to all cases where the mortgagee holds the property either as co-proprietor or as mortgagee—*Ram Birch Narain v. Ambika Prosad*, 17 C.W.N. 586, 19 I.C. 90. This is also the view held by the Nagpur Court—*Pyarelal v. Pannalal*, 56 I.C. 193. But this view must be deemed as overruled by the Privy Council in *Sorabjee v. Dwarkadas*, cited above.

387. Accessions capable of severance:—Where the accessions are made at the expense of the mortgagee, and are capable of severance from the principal property without any detriment to it, they may, at the option of the mortgagor, be acquired by him on payment to the mortgagee of the expenses of acquiring them. If the mortgagor elects to take them, the mortgagee cannot refuse to part with their possession; because the mortgagee must be presumed to have acquired them on behalf of the mortgagor, and is bound to deliver them to the mortgagor on redemption—See *Dildar v. Shukrulla*, 46 All. 152 (153), 78 I.C. 1023; and compare also section 90 of the Trusts Act.

In an Allahabad case it was stated that a building erected on the mortgaged land by the mortgagee in place of a *kutch*a house which had fallen down, was an accession capable of separate enjoyment, and that if the mortgagor refused to pay for it, the mortgagee was entitled to remove the materials of the house—*Gopi Lal v. Abdul Hamid*, 26 A.L.J. 887, A.I.R. 1928 All. 381 (386), 116 I.C. 91. But in a recent Full Bench case of the same High Court, it has been ruled that a new house erected on the mortgaged land is not capable of separate possession or enjoyment *as a house*, and that the house is a good deal more than the mere building materials; it therefore follows that the mortgagor can insist on the house being delivered with the mortgaged land at the time of redemption, and the mortgagee cannot be allowed to say that he would separately enjoy (*i.e.*, remove) the building materials. As the construction of the building was neither made with the mortgagor's assent nor was it necessary to preserve the land from destruction, the mortgagee could not claim compensation—*Nannu v. Ram Chander*, 53 All. 334 (F.B.), 132 I.C. 401, 1931 A.L.J. 273, A.I.R. 1931 All. 277 (283, 284). Where the mortgagee

erected a stable on the mortgaged land, and the materials of the stable could be removed without injury to the other property, *held* that it was an accession capable of separate enjoyment and the mortgagee was allowed to remove the materials—*Durga Shankar v. Ganga*, 1932 A.L.J. 493, A.I.R. 1932 All. 500 (502).

The mortgagee is entitled to claim only the costs incurred by him in acquiring the accessions and not their estimated *market value*. If the mortgagor desires to have possession of the accessions, he should *immediately on the expiry of the mortgage*, tender to the mortgagee the costs incurred by him in making the acquisitions. If the mortgagor never treats the lands as accessions or makes any claim on the expiry of the term of the mortgage, but allows the mortgagee to remain in possession of the lands as occupancy *raiyat*, he cannot *subsequently* claim the accessions—*Ram Lagan v. Mary Coffin*, 8 P.L.T. 23, A.I.R. 1926 Pat. 572 (574), 97 I.C. 159.

388. Inseparable acquisitions:—The mortgagor, or redemption, is entitled to all acquisitions which are not capable of separate enjoyment without detriment to the principal property, but he is liable to pay for the expenses in two cases; (1) where the accessions are necessary to preserve the property from destruction, forfeiture or sale; or (2) where they were made with the mortgagor's consent.

Where the mortgagee has planted on the mortgaged land a grove of mango trees numbering about 110, the grove is not capable of separate possession or enjoyment without detriment to the main property, because if the mortgagee were to cut down and remove the trunks of the trees, the land would not be restored to its former condition. The mortgagor would be entitled to the grove without paying any compensation, since it was planted without his consent and was not necessary for the preservation of the property—*Nageshwari v. Nand Lal*, 48 All. 70, A.I.R. 1926 All. 67, 88 I.C. 908; *Ajodhya v. Indra*, 113 I.C. 405, A.I.R. 1929 All. 330 (331); *Ma E. v. Maung Po*, 8 Rang. 233, A.I.R. 1930 Rang. 63, 126 I.C. 538; *Jahangir v. Ram Harakh*, 13 O.L.J. 243, 92 I.C. 262, A.I.R. 1926 J. 190. But in *Ram Brich v. Chhakauri*, A.I.R. 1925 All. 748 (750), 86 I.C. 929, it has been held that if the mortgagor is unwilling to pay for the expenses of planting and rearing the trees, the mortgagee would be entitled to cut down and remove the trees, and the severance of the trees would not be detrimental to the land. *Quaere*, whether the planting of trees can be called an 'accession'—*Ajodhya v. Indra*, *supra*. This subject would now fall under the new section 63A. See Note 389 thereunder.

Accessions necessary to preserve the property:—In a suit for redemption it was found that a certain grove was planted by the mortgagee in possession and that separate possession and enjoyment of the grove without detriment to the principal property was not possible. It was further found that the planting of the grove was *not* necessary to preserve the property from destruction, forfeiture or sale, and the grove was not planted with the consent of the mortgagor. Consequently, under this section, the mortgagor was entitled to obtain delivery of possession of the grove and the mortgagee was not entitled to be compensated for it—*Zubeda v. Sheo Charan*, 22 All. 83 (85). So also, where the mortgagee, without the consent of the mortgagor, constructed a building which was in no way necessary for the maintenance or preservation of the property, the mortgagee could not recover the cost of the building—*Sammo v. Abdul*

Wahid, 1883 A.W.N. 208, followed in *Rupan v. Champa Lal*, 37 All. 81 (85). See also *Nannu v. Ram Chander*, 53 All. 334 (F.B.), cited in Note 387 ante. So again, where the mortgagee excavated a new well and such excavation was not necessary for the preservation of the property, which was an agricultural land, he was not entitled to be compensated for the expenses—*Raja Ram v. Vithal*, 10 N.L.R. 166, 26 I.C. 712. If a house falls down, the rebuilding of it is not an accession necessary to preserve the property from destruction; for when it has fallen down, it is impossible to preserve it from destruction. The remedy of the mortgagee would lie under sec. 68—*Kallu v. Ganesh*, A.I.R. 1929 All. 348 (349), 116 I.C. 747. But see *Rupan v. Champa*, 37 All. 81, where the building of a *pucca* room in place of a *kutch*a room which has fallen down has been held to be an expense necessary for the preservation of the property, for otherwise the house would be uninhabitable.

63A. (1) *Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in subsection (2), be liable to pay the cost thereof.*

(2) *Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.*

This section has been inserted by sec. 27 of the Transfer of Property Amendment Act (XX of 1929).

"Section 63 applies to accessions only. There is no express provision in the Act allowing a mortgagee to make improvements to the mortgaged property. In the absence of such express provision it has been held in some cases that a mortgagee is not entitled to charge or obtain any compensation for improvements made (I.L.R. 19 Mad. 327; 37 All. 81). On the other hand, some Courts following the English decisions in *Shepard v. Jones*, 21 Ch. D. 469, *Sandon v. Hooper*, 6 Beav. 246, and *Henderson v. Astwood*, (1894) A.C. 150, have held that a mortgagee should have a charge for improvements if they are reasonable (I.L.R. 43 Bom. 69; 45 Bom. 1301). According to the English law, as summarised by Fisher on Mortgage (Art. 1782, 6th Edn.), 'the improvements must always be reasonable having regard to the nature and value of the estate: for, if it were not so, a weapon would be put in the mortgagee's hands with which he might greatly clog the right of redemption: which he has

no right to make more expensive than is necessary to keep the estate in good repair and working order and to protect the title.' The English cases on the subject are also reviewed in Coote on Mortgage, where it is pointed out that the later decisions are more favourable to the mortgagee than the older authorities. In the 8th Edition of Coote on Mortgage, the law is thus expounded (p. 1232):—

'Unless the sanction of the mortgagor has been obtained, the mortgagee will not be allowed for substantial repairs, not being strictly necessary, or for improvements, unless the value of the property has been increased thereby.....Indeed, according to some older cases, even substantial improvements have been disallowed, unless done with the consent of, or acquiescence after notice by, the mortgagor. A mortgagee can hardly be said to be safe in making improvements in the mortgaged property without such consent or acquiescence. But the tendency of later decisions appears to be more favourable to the mortgagee in this respect and it has been laid down that, *prima facie*, a mortgagee who expended money in improvements is entitled to an inquiry whether the outlay has increased the value of the property, and to be allowed such outlay so far as the value is proved to have been increased thereby'.

"We prefer to adopt in India the view summarised in Fisher on Mortgage except that we do not consider it desirable to leave it to the Court to determine in each case what improvements are reasonable and what not. We accordingly propose to have a uniform and definite rule, namely, that no mortgagee shall be entitled to charge for any improvements unless they are made to preserve the property from destruction or deterioration or unless they are necessary to prevent the security from becoming insufficient or made in compliance with the lawful order of any public servant or public authority. We accordingly propose to add a new section 63A dealing with improvements. We have throughout guarded the right of private contract."—*Report of the Special Committee*.

This section closely follows the language of the preceding one, but differs from it in this respect that while sec. 63 makes a distinction between accessions capable of separate enjoyment and accessions not so enjoyable, no such distinction is recognised in the present section as to improvements. Further, this section says nothing about improvements made with the *consent* of the mortgagor.

389. Improvements by mortgagee:—Before the enactment of this section, the question as to whether and to what extent a mortgagee is entitled to make improvements on the mortgaged property was decided with reference to clause (b) of sec. 72. The present section is a statutory embodiment of the principles enunciated in some of those decisions.

Sub-section (1) lays down the general rule that ordinarily a mortgagee is not at liberty to effect improvements and charge the mortgagor therewith. See *Arunachella v. Sithayi*, 19 Mad. 327 (329); *Jangi Ram v. Sheoraj*, 2 O.L.J. 338, 30 I.C. 234 (237). The object of the law is to prevent the mortgagee from laying out large sums of money and thereby increasing his debt to such an extent as to cripple the power of redemption. The mortgagee has no right to lay out money in improving the property which may be done in such a way as to make it utterly impossible for the mortgagor with his means ever to redeem. This is called 'improving

a mortgagor out of his estate'—*Sandon v. Hooper*, 6 Beav. 246; *Dnyanu v. Fakira*, 45 Bom. 1301 (1305), 64 I.C. 16, A.I.R. 1921 Bom. 250. Thus, where the amount of improvements was five times the mortgage money, the mortgagee's claim for the value of the improvements was disallowed—*Ramappa v. Yellappa*, 52 Bom. 307, A.I.R. 1928 Bom. 150 (152), 109 I.C. 532.

The mere *consent* of the mortgagor to the improvement being made would not make him liable, unless given under circumstances to make it equivalent to a promise to re-imburse the cost to the mortgagee—*Arunachella v. Sithayi*, 19 Mad. 327 (329).

In some cases it was held, following *Shepard v. Jones*, (1882) 21 Ch. D. 469, and *Henderson v. Astwood*, (1894) A.C. 150, that the mortgagee was entitled to be repaid the expenses if the improvements were accessions within the meaning of sec. 63, or were necessary for the preservation of the property under sec. 72 (b) or were lasting improvements *reasonably* made for the benefit of the property and added to its selling value—*Rahmatulla v. Yusuf*, 10 A.L.J. 124, 16 I.C. 635 (638); *Rupan v. Champa*, 37 All. 81 (85); *Durga v. Naurang*, 17 All. 282 (284); *Dnyanu v. Fakira*, 45 Bom. 1301 (1305); *Nijlingappa v. Chenabasawa*, 43 Bom. 69 (74); *Rikhi Kesh v. Jwala Sahai*, 78 P.R. 1919, 52 I.C. 862; *Labhu Ram v. Abdulla*, 75 I.C. 183, A.I.R. 1923 Lah. 587. See also Fisher on *Mortgages*, 6th Edn., p. 897. In allowing the costs of improvements the Court must naturally be on its guard against extravagant and unfounded claims, and should enquire strictly into the facts and fairness of the claim in each particular case—*Nijlingappa v. Chenabasawa*, *supra*. Under the present section the question as to whether the improvement is reasonable or not must be decided with reference to the rule laid down in sub-section (2). See the *Report of the Special Committee* quoted above.

If there is a contract between the parties as to making improvements, it must be given effect to. Thus, where the mortgage was of a *katcha* house, and the terms of the mortgage-deed *expressly authorised* the mortgagee to rebuild any portion of the house that might fall down during the rains, and the *katcha* house having tumbled down during the rains, the mortgagee rebuilt a *pucca* house which was not bigger than the old one but was of the same size and pattern, *held* that the mortgagee's claim to recover the cost of rebuilding the house was quite fair and must be allowed—*Qasim v. Bhagwandeem*, 7 O.W.N. 488, A.I.R. 1930 Oudh 337 (338), 126 I.C. 397.

Mortgagee:—If a certificated guardian of a minor executes a mortgage on behalf of the minor without taking the permission of the Court under sec. 29, Guardians and Wards Act, and the minor on attaining majority avoids the mortgage, there is no relationship of mortgagor and mortgagee, and the latter making any improvement on the mortgaged property is not entitled to add the costs of the improvement on the mortgage-money—*Bechu v. Bhabhuti*, 52 All. 831, A.I.R. 1931 All. 201 (202).

'Necessary to preserve the property,' etc.:—Sub-section (2) lays down that the mortgagor shall be liable to pay the cost of improvements if they are necessary to preserve the property from destruction, deterioration, etc.; compare clause (b) of sec. 72. What has to be determined is whether the expenditure was necessary to preserve the property from destruction—*Arunachella v. Sithayi*, 19 Mad. 327 (329). Thus, where a mortgagee of agricultural land had spent money in repairing a well on

the property which had been rendered useless from natural causes, it was held that the mortgagee was entitled to add the amount so expended to the mortgage-debt—*Durga Singh v. Naurang*, 17 All. 282 (284). Where the mortgaged property was a mill, the mortgagee was allowed the value of improved machinery in place of the old, on proof that it was necessary in order to run the mill in successful competition with other mills in the neighbourhood which contained such machinery—*Pingrey on Mortgages*, § 2117, 2120. If the mortgagee has rebuilt any fallen portion in order to retain the income which was derivable from the same, he can legitimately get the cost thereof and charge the same on the property in connection with which such expense was incurred—*Amba Prasad v. Wahidullah*, 44 All. 708 (712). Where the *kutchra* room fell down and the mortgagee built a *pucca* room in place of it, the expense was held to have been properly incurred for the preservation of the property; for otherwise the house would have been uninhabitable—*Rupan v. Champa*, 37 All. 81 (84); especially when it appeared that the rebuilding was within the contemplation of the parties when the mortgage-deed was executed—*Qasim v. Bhugwandeem*, 7 O.W.N. 488, A.I.R. 1930 Oudh 337; but where the mortgagee also built a second storey, *held* that such a building altered the character of the house, and having been made without the mortgagor's consent and not being necessary for the preservation of the estate, the mortgagee was not entitled to the money spent on it—*Rupan v. Champa*, 37 All. 81 (84). Where the mortgagee claimed the expenses incurred for building a granary and laying out water pipes, *held* that the laying out of pipes was not a necessary improvement or substantial repair so as to make the mortgagor liable, and as the granary was a moveable object, the mortgagee could remove the same and no credit should be allowed for it—*Narayanaswami v. Soranammal*, 15 M.L.T. 374, 22 I.C. 635. The mortgagee will not be justified in demolishing the house and rebuilding it at a cost equivalent to several times the mortgage-debt, and charging the mortgagor therewith—*Surapee v. Diwan Chand*, 59 I.C. 764 (Lah.). The mortgagee has no right to charge for the cost of a gratuitous structure made without the consent of the mortgagor, and in no way necessary for the maintenance or preservation of the mortgaged property—*Sammo v. Abdul Wahid*, 1883 A.W.N. 208. See also *Bechu v. Bhabhuti*, 52 All. 831, A.I.R. 1931 All. 201 (202), 124 I.C. 731; *Gopi Lal v. Abdul Hamid*, 26 A.L.J. 887, A.I.R. 1928 All. 381 (385, 386), 116 I.C. 91; and also the Full Bench case of *Nannu v. Ram Chander*, 53 All. 334 (F.B.), cited in Note 387 under sec. 63.

The law on the subject of improvements has been thus succinctly laid down by Fisher in his work on Mortgages, § 1781: "The mortgagee will be allowed for proper and necessary repairs to the estate, and if buildings are incomplete or become ruinous so as to be unfit for use, he may complete or pull them down and rebuild them for the preservation of his security. And the rebuilding or repairing may be done in an improved manner and more substantially than before, so that the works be done providently, and that no new or expensive buildings be erected for purposes different from those for which the former buildings were used; for the property when restored ought to be of the same nature as when the mortgagee received it. And if it be thus wholly or in part converted from its original purposes the money expended will not be allowed to be charged upon it."

The planting of trees on the mortgaged land is not an improvement necessary for the preservation of the property—*Raghunandan v. Raghunandan*, 43 All. 638 (643) (F.B.); *Zubeda v. Sheo Charan*, 22 All. 83 (85); and the mortgagor is entitled to the trees without paying any compensation for them. See *Nageshwari v. Nand Lal*, 48 All. 70, *Zubeda v. Sheo Charan* (supra), *Ajodhya v. Indra*, 113 I.C. 405, A.I.R. 1929 All. 330 (331), *Ma E v. Maung Po*, 8 Rang. 233, and *Jahangir v. Ram Harakh*, 13 O.L.J. 243, 92 I.C. 263, cited in Note 388 under sec. 63. In *Raghunandan v. Raghunandan*, (supra) it was held that the mortgagor was not entitled to the trees, as they were not planted by him, but that the mortgagee should be allowed to cut down and remove the trees. A similar view was taken in *Ram Brichh v. Chhakauri*, A.I.R. 1925 All. 748 (750), 86 I.C. 929. In a more recent Allahabad case it has been held that the question as to whether the mortgagor should be allowed to remove the trees should be decided on a consideration whether it is practicable to remove the trees—*Ajodhya v. Indra*, supra.

Costs of improvements:—The mortgagee can claim the value of those improvements which are on the land in a reasonably good condition at the time of actual redemption. So, where the value of improvements has been assessed in the redemption-decree, but some of the improvements have been destroyed between the date of decree and the date of actual redemption, the mortgagor would be entitled to obtain a reduction of the amount mentioned in the decree. To hold otherwise would tend to incline mortgagees to neglect between the date of the redemption decree and the date of its execution, the duty of properly looking after the improvements, compensation for which has been assessed, and in some cases even to destroy them to the injury of the mortgagors—*Krishna v. Srinivasa*, 20 Mad. 124 (126, 128). Similarly, the mortgagee can claim a revaluation if he can show that since the passing of the redemption-decree, the value of the improvements has increased—*Ramunni v. Shanku*, 10 Mad. 367.

64. Where the mortgaged property is a lease, * * * and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

Amendment:—The words “for a term of years” have been omitted by sec. 28 of the T. P. Amendment Act (XX of 1929), because they are unnecessary according to the opinion of the *Special Committee*. These words have also been omitted from sections 65 and 71.

389A. Scope of section:—This section embodies the law as laid down in *Rowe v. Chichester*, (1773) Amb. 719, where Lord Bathurst stated the rule thus: “If trustees, mortgagees and persons interested obtain renewal, the new lease is always subject to the trusts and limitations of the old lease.”

This section may be compared with illustration (a) of sec. 90, Indian Trusts Act:—“A, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.” A similar illustration is appended to sec. 3 of the Specific Relief Act. The principle of this section is that if a trustee or a mortgagee obtains a lease during

the continuance of the trust or mortgage, the benefit of the lease taken by the trustee or mortgagee enures to the benefit of the *cestui que trust* or the mortgagor—*Baijnath v. Harikishen*, 6 C.W.N. 372. Therefore, if the mortgagee obtains a renewal, the mortgagor has generally the benefit of the new term upon redemption; because, the additional term comes from the old root subject to the same equity of redemption—*Rakestraw v. Brewer*, 2 P. Wms. 510.

The mortgagee is entitled to recover the costs of the renewal and may add the costs to the principal money; see sec. 72 (*e*).

Implied contracts by mortgagor.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

- (a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;
- (b) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;
- (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;
- (d) and, where the mortgaged property is a lease, * * * that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee, have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein, and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;
- (e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on such prior incumbrance as and when it becomes due, and will, at the proper time, discharge the principal money due on such prior incumbrance.

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The benefit of the contracts mentioned in this section shall be annexed to, and shall go with, the interest of the mortgagee as such, and may be enforced by every person in whom that interest is, for the whole or any part thereof, from time to time, vested.

Amendment:—By section 29 of the Transfer of Property Amendment Act (XX of 1929) the words “for a term of years” have been omitted from clause (d), as they are unnecessary, and the last paragraph but one has been omitted. This para stood as follows:—

“Nothing in clause (c), or in clause (d), so far as it relates to the payment of future rent, applies in the case of a usufructuary mortgage.”

The reasons for omitting this para have been thus stated:—

“This section relates to the implied covenants by a mortgagor, and provides in the penultimate paragraph that covenants regarding payment of public charges and future rent in the case of leasehold property do not apply in the case of a usufructuary mortgage. This provision is not clear. Covenants specified in the section are binding on a mortgagor in consequence of his obligation to preserve the mortgage-security. No sufficient reason is apparent why, in the case of a usufructuary mortgage when possession is not delivered to the mortgagee, the mortgagor should not be under a duty to pay the public charges and future rent. It appears from the papers underlying the Act that the provision at present contained in this paragraph was first introduced in Bill IV of 1879, when clauses (c) and (d) did not contain the words ‘so long as the mortgagee was not in possession’. In the case of a usufructuary mortgage, if the mortgagor has not put the mortgagee in possession, it is as much his duty as it is in the case of any other mortgage to preserve the property on the security of which he has obtained a loan. The words ‘so long as the mortgagee was not in possession’ were added in sub-clauses (c) and (d) of section 65 in the final Bill, but, apparently through inadvertence, this paragraph was not omitted.”—*Report of the Special Committee.*

390. Scope of section:—This section, like sec. 55, is to operate only when the parties have not entered into a *contract to the contrary*. But the contract made by the parties must be a valid one. A contract that payments of the mortgage-money which are not entered on the back of the bond should not be recognised is not a valid one and cannot come within the section—*Narayan v. Motilal*, 1 Bom. 45 (49).

Not only the mortgagee but any one claiming under him is entitled to the benefit of the implied covenants under this section (see the last para of the section). But the contract is personal to the *mortgagor*; the purchaser of the equity of redemption from a mortgagor is not a party to such a covenant and therefore there is no obligation on him to pay the public charges accruing due in respect of what he has purchased, though it may be to his interest to do so and avert a revenue sale of the mortgaged property—*Srinivasachari v. Gnanaprakasa*, 30 Mad. 67 (71).

391. Clause (a)—Covenant for title:—Compare sec. 55 (2). This clause does not apply to a case where the mortgage was created prior to the passing of this Act though one of the further charges was subsequent to it—*Saiyid Abdulla v. Saiyid Basharat Hussain*, 35 All. 48 (P.C.), 17 C.W.N. 233, 17 I.C. 737.

The covenant implied in clause (a) is twofold—(1) as to the *quantum* of interest mortgaged and (2) as to the transferability of the interest by the mortgagee.

(1) The *interest* which the mortgagor professes to transfer will have to be construed in the light of section 8. The combined effect of that section and this clause is that in the absence of a contract to the contrary the interest which the mortgagor professes to transfer must be deemed to be all that the mortgagor has, which he shall be deemed to transfer unreservedly—*Chiranji Lal v. Bhagwan*, 8 I.C. 826 (All.).

(2) The *power of transfer* implies that the property is alienable *i.e.*, it does not fall within the category of non-transferable properties mentioned in section 6, and that the mortgagor is a person competent under section 7 to transfer it.

Where it was found that the mortgagor had no title, but the mortgagee took the mortgage *bona fide* without notice of the absence of title, the latter was awarded a decree on the mortgage against the property—*Venkata Narasimha v. Gundu Sastrulu*, 9 M.L.T. 365, 3 I.C. 504.

Whether the mortgagor had or had not the power to make the mortgage, this clause lays down that once he has mortgaged the property, it must be implied that he had power to make the mortgage, and he cannot, in a suit by the mortgagee, take up the position that he had no power to transfer the property by mortgage. And this estoppel will operate not only against the mortgagor but also against the successors-in-interest of the mortgagor. They cannot deny that the estate which the mortgagor mortgaged was vested in him. They are in no better position than the mortgagor—*Achhaibar v. Rajmati*, 51 All. 802, A.I.R. 1929 All. 483 (484), 121 I.C. 111.

The purchaser at an execution sale of the interest of the mortgagor is also bound by the same rule of estoppel as his judgment-debtor (mortgagor) and cannot occupy a position of greater advantage. He is as much bound by the rule of estoppel not to dispute the validity of the mortgage as the mortgagor himself—*Debendra v. Mirza Abdul*, 10 C.L.J. 150, 1 I.C. 264 (271).

392. Substituted security—mortgage of undivided share:—Where the owner of an undivided share in a joint and undivided estate mortgages his undivided share, he cannot, by so doing, affect the interests of the other co-sharers; and the persons who take the security, *i.e.*, the mortgagees, take it subject to the right of these co-sharers to enforce a partition and thereby convert what is an undivided share of the whole into a defined portion held in severalty—*Byjnath v. Ram Oodeen*, 1 I.A. 106, 21 W.R. 233 (P.C.). That is, a person who advances money upon a mortgage of property, which the mortgagor holds in an undivided share, must be deemed to take it subject to the liability of the property to be subsequently partitioned—*Shahebzada v. Hills*, 35 Cal. 388. Therefore, a mortgagee of an undivided share, when there takes place a subsequent partition, will be entitled, as his security after the partition, to the separate share allotted to his mortgagor, in place of the undivided share—*Hem Chunder v. Thako Moni*, 20 Cal. 533; *Lakshman v. Gopal*, 23 Bom. 385; *Joy Sankari v. Bharat Chandra*, 26 Cal. 434; *Bhup Singh v. Chedda Singh*, 42 All. 596 (599); *Amolak Ram v. Chandan*, 24 All. 483; *Pulamma v. Pradosham*, 18 Mad. 316. The mortgage cannot, in the absence of a fraud in the partition, be enforced against the share originally

mortgaged; the mortgagee's sole remedy is to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged—*Amolak Ram v. Chandan*, 24 All. 483; *Muthia Raja v. Appala Raja*, 34 Mad. 175; *Hakim Lal v. Ram Lal*, 6 C.L.J. 46; *Shahebzada v. Hills*, 35 Cal. 388.

Other cases of substituted security:—Where a zemindar, having mortgaged by way of usufructuary mortgage his zemindari together with his *sir* land, lost his zemindari rights and became an ex-proprietary tenant of the *sir*, it was held that the usufructuary mortgage did not become ineffectual, but took effect as a mortgage of the ex-proprietary rights—*Sham Das v. Batul Bibi*, 24 All. 538. If the mortgaged property is converted into money under circumstances which prevent the mortgagee from following such property, the security will attach to the purchase-money. As the security of the mortgage is indivisible, the charge would fasten upon the whole proceeds and not on any particular part—*Tapan Das v. Jeso Ram*, 17 P.R. 1907, 2 P.L.R. 1908. Thus, where a *patni taluq* had been sold for arrears of revenue and the mortgagee thereof claimed the surplus sale-proceeds, *held* that the sale-proceeds would be regarded as the shape into which the mortgage-money was converted; and as before such conversion the security could not be split up into parts, and the mortgagee was entitled to realise his money out of the whole of it, its conversion by sale into money ought not to affect his rights in this respect—*Gosto Behary v. Shibnath*, 20 Cal. 241. Two brothers K and T mortgaged their property to B. K again mortgaged his share to B. T's interest passed to other persons. B brought a suit for sale upon the first mortgage and obtained a decree. The sale of the property satisfied the first mortgage and left a balance. B applied for half the money so left as a second mortgagee of K's share. *Held* that B was so entitled—*Bakhtawar v. Baru Mal*, 4 A.L.J. 492.

After-acquired interests:—If the mortgagor professes to mortgage a property over which he has no title or has a defective title, then if he subsequently acquires title thereto, the mortgagee is entitled for the purposes of his security to all such subsequently acquired interests. See this subject discussed in Note 198 under sec. 43.

393. Clause (b)—Covenant for defence of title:—The mortgagor must defend his own title, if he is himself in possession of the mortgaged property; if the mortgagee is entitled to possession, the mortgagor must give him quiet possession and help him in defending his possession by coming forward to vindicate his title against all intruders. The mortgagee is therefore entitled to be reimbursed the expenses incurred by him in defending the title—*Damodar v. Vamanrao*, 9 Bom. 435. Where the mortgagee is deprived of a part of the mortgaged property by the act of the mortgagor, he is entitled to recover the mortgage-money from the latter—*Haris Chandra v. Keshab Chandra*, 54 I.C. 785 (Cal.). See clause (c) of section 68.

394. Clause (c)—Payment of public charges:—Under this clause, the mortgagor is to be taken to covenant, in the absence of a contract to the contrary, to pay all public charges in respect of the mortgaged property, when the mortgagee is not in possession—*Srinivasa v. Gnana-prakasa*, 30 Mad. 67 (71). But this covenant is personal to the mortgagor, and is not one arising by virtue of his being in possession of the mortgaged property. Hence, if after the creation of a simple mortgage,

a stranger acquires the equity of redemption by adverse possession against the mortgagor, the acquirer is under no duty towards the mortgagee to pay the revenue payable on the property; and therefore if after allowing it to be sold for arrears of revenue he buys it himself, he holds it free from the mortgage—*Subbiah v. Rami Reddi*, 39 Mad. 959 (963, 964). Similarly, the purchaser of the equity of redemption from the mortgagor is under no obligation to pay the public charges, though it may be to his interest to do so to avert a revenue sale—*Srinivasa v. Gnanaprakasa*, 30 Mad. 67 (71). In other words, the liability of the mortgagor to pay the Government revenue continues, even though he parts with his equity of redemption. But this implied covenant of the mortgagor to pay the revenue comes to an end with the extinction of the equity of redemption by *Court-sale*—*Balkrishna v. Vishwanath*, 19 Bom. 528. If, however, the mortgagor himself purchases the land at the revenue sale, the original mortgage is not extinguished and the liability to pay the revenue will continue—*Po Dwe v. K. M. T. S. Chetty*, 12 Bur.L.T. 41, 51 I.C. 574. The effect would be the same if the property is purchased at the revenue sale by the heir of the mortgagor instead of by the mortgagor himself—*Lakshmayya v. Bolla Reddi*, 26 Mad. 385.

395. Clause (d)—Payment of rent, etc.:—Where the mortgage is without possession, the mortgagor must pay the rent reserved by the lease and fulfil all other conditions necessary for its continuance so as not to impair the mortgagee's security. If the mortgagor makes any default to the prejudice of the mortgagee, the latter can maintain a suit for damages—*Singjee v. Tiruvengadam*, 13 Mad. 192. But if the mortgagee enters into possession, his liability to pay rent to the mortgagor's lessor has to be determined with reference to sec. 108, cl. (j), and not with reference to this clause, because this clause deals only with the rights and liabilities of the mortgagor and mortgagee *as between themselves*, and not with the rights and liabilities as between the mortgagor's lessor and the mortgagee—*Thethalan v. Eralpad*, 40 Mad. 1111 (1117). The mortgage of a leasehold gives rise to question of *privity of estate* between the lessor and the mortgagee. This subject has been fully dealt with in Note 580 under sec. 108, sub-heading "Privity of estate."

396. Clause (e)—Covenant for payment of prior incumbrances:—Under this clause, the mortgagor is deemed to covenant with the second or subsequent mortgagee to pay off the prior mortgage-debt on its becoming due. If there is a breach of this covenant, and the subsequent mortgagee is deprived of his security, the breach is a default within the meaning of clause (b) of sec. 68, and the mortgagee will be entitled to sue for a personal decree, although there was no personal covenant in the mortgage—*Singjee v. Tiruvengadam*, 13 Mad. 192. Where the mortgagor left a sum of money with the second mortgagee for redemption of a prior mortgage, but the mortgagee was compelled to pay a much larger sum for redeeming that mortgage and obtaining possession, *held* that on the principle underlying this clause the mortgagor was bound to bear the whole expense incurred by the second mortgagee in obtaining possession from the first mortgagee—*Gauri Shankar v. Bhairon*, 13 O.L.J. 289. A.I.R. 1926 Oudh 207, 92 I.C. 17.

396A. Last para—Covenants run with the land:—The last para declares that the rights conferred by this section are not personal to the mortgagee but will enure for the benefit of the holders of the whole or

part of his interest. Thus, in the case of an implied contract by the mortgagor under clause (c) to pay the public charges in respect of the mortgaged property, not only the mortgagee but any one claiming through him is entitled to the benefit of this covenant—*Srinivasa v. Gnanaprakasa*, 30 Mad. 67 (71). The covenant for title implied by clause (a) can be enforced not only by the mortgagee but also by a person purchasing the interest of the mortgagee—*Ma Gun v. Mg. Lu Gale*, A.I.R. 1925 Rang. 130, 3 Bur.L.J. 282, 85 I.C. 223.

65A. (1) Subject to the provisions of sub-sec. (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

Mortgagor's power to lease.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.

397. This section has been inserted by sec. 30 of the T. P. Amendment Act (XX of 1929). The reasons have been thus stated:—

"In the absence of an express provision in the Act, a question is sometimes raised whether a mortgagor in possession is competent to grant a lease of the mortgaged property during the continuance of the mortgage and whether such a lease is binding on the mortgagee. In England,

before the Conveyancing Act, 1881, was passed, a mortgagor could not grant leases which were binding on the mortgagee [*Keech v. Hall*, 1 Smith L. C., 12 Edn., 577; *Corbett v. Plowden*, 25 Ch. D. 678; *Robbins v. Whyte* (1906) 1 K.B. 125]. This view was followed in the case of an English mortgage in Bombay (I.L.R. 30 Bom. 250) and it was observed as follows:—

‘If a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them.’

“In Allahabad, it was held that a mortgagor ordinarily cannot, without the concurrence of his mortgagee, execute a lease which would be binding upon the mortgagee. He may execute a lease which may be binding upon himself and so long as the mortgagee does not interfere with the possession of the lessee, so long may the lessee enjoy the benefit of the lease; but ordinarily without the concurrence of the mortgagee the mortgagor cannot grant a lease which will be binding upon the mortgagee (2 A.L.J. 294). This view was not accepted in Calcutta. In 40 C.L.J. 500, following the observation in *Ghose on Mortgage* (Vol. I, p. 213), it was held that a mortgagor may make a lease conformable to usage and in the ordinary course of management, and the tenancy so created will be binding on the mortgagee. The Conveyancing Act, 1881, expressly authorises a mortgagor to grant leases of the mortgaged property for particular periods (section 18 of the Conveyancing Act, 1881, and section 99 of the Property Act 1925). In our opinion, it is necessary to provide expressly in the Transfer of Property Act that a mortgagor shall, subject to express conditions in the mortgage-deed, be entitled to grant a lease of the mortgaged property. In order, however, to protect the interests of the mortgagee, we propose to provide certain restrictions, mostly taken from section 99 of the Law of Property Act, 1925, with variations suitable to the conditions of this country.”—*Report of the Special Committee*.

Clauses (a) and (b) of sub-section (2) of this section have been taken from *Kiran Chandra v. Dutt and Co.*, 40 C.L.J. 500, 29 C.W.N. 94, 85 I.C. 522, A.I.R. 1925 Cal. 251 (252, 253), in which the following observations have been made: “The powers of a mortgagor to grant leases after the execution of the mortgage are very limited. He may no doubt make a lease conformable to usage in the ordinary course of management; for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses; but it is well settled that a mortgagor cannot, after the date of the mortgage, and in the absence of an express power in that behalf or the concurrence of the mortgagee, create, except as stated above, a lease or a tenancy which will bind the mortgagee, and if he purports to create such a lease or tenancy, the mortgagee or his transferee may proceed to eject the lessee or tenant. If that is so, the payment of rent in advance by virtue of a lease granted by the mortgagor after the execution of the mortgage is not binding on the mortgagee.” See also *M. P. M. S. Firm v. Ko Pyu*, 10 Rang. 210, A.I.R. 1932 Rang. 113 (114), 138 I.C. 213. The law is also laid down by Mookerjee J. as follows: “It cannot be maintained that the mortgagor has anything like a general authority to deal with or affect the mortgaged property during his possession thereof. The true position thus

is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage"—*Madan Mohan v. Raj Kishori*, 21 C.W.N. 88 (92), 39 I.C. 182; followed in *Anand Ram v. Dhanpat*, 1 P.L.J. 563 (569), 38 I.C. 37, *Beni Prasad v. Gangoo*, 7 Pat. 349, A.I.R. 1928 Pat. 372 (374), 110 I.C. 287, and *Mathura v. Mandil*, 1 P.L.T. 392, 56 I.C. 805 (806).

Before the enactment of this section, the question whether a mortgagee in possession could grant a lease of the mortgaged property was decided with reference to sec. 66, namely, whether the granting of a lease was an "act destructive or permanently injurious to the mortgaged property" or whether the "security was rendered insufficient by such act." In the following cases it was held that the granting of a lease was not an act of waste within the meaning of sec. 66 and was valid—*Ramlal v. Muhammad Irshad*, 1890 A.W.N. 59; *Tana Peena v. Mamakkantakath*, 8 L.B.R. 413, 34 I.C. 24 (25); *Chotey Singh v. Baldeo*, 2 O.W.N. 457, 12 O.L.J. 527, A.I.R. 1925 Oudh 542 (544), 88 I.C. 947.

Clause (b) lays down that no rent shall be payable in advance; and the fact that the lessee paid rent for 3 years in advance is no answer to the mortgagee's suit for ejectment. See *M. P. M. S. Firm v. Ko Pyu*, 10 Rang. 210, A.I.R. 1932 Rang. 113 (114). The above Burma case (8 L.B.R. 413) in which a grant of a lease with receipt of rent in advance for the whole period was upheld, is no longer good law.

Clause (c) prohibits the mortgagor from making a covenant for renewal. Even before the amendment, it was also held in a Madras case that the mortgagor could not grant a renewal, as the effect of the renewal was to materially diminish the security—*Moidunni Haji v. Madhavan*, 65 M.L.J. 826, A.I.R. 1933 Mad. 876 (877).

Clause (e) lays down that in the case of buildings, the duration of the lease shall not exceed three years. In *Rustomji v. Keshavji*, 28 Bom. L.R. 1162, 98 I.C. 436, A.I.R. 1926 Bom. 567 (569), a lease of certain premises for 12 years was held to be invalid under sec. 66. Similarly, a lease of a building for 20 years with a covenant for renewal was held to be not binding on the mortgagee—*Mangtulal v. Upendra*, 57 Cal. 82, A.I.R. 1930 Cal. 335 (338), 125 I.C. 661. So also, it was held that a permanent lease of the mortgaged property rendered the security insufficient within the meaning of sec. 66—*Bank of Upper India v. Jaggan*, 4 O.W.N. 228, A.I.R. 1927 Oudh 148 (149), 100 I.C. 728; *Manthura v. Jagmohan*, 6 Luck. 546, A.I.R. 1931 Oudh 256, 132 I.C. 532.

But although a lease may be for a period of more than three years, still as between the mortgagor and his tenant, the tenancy will be valid until the mortgagee chooses to exercise his paramount rights. Until a suit for ejectment has been brought by the mortgagee, the tenant will be estopped from disputing his landlord's title on the ground of invalidity of the lease. See *Rustomji v. Keshavji*, supra.

This new section has no retrospective operation—*Dasain v. Ramdulari*, 10 Pat. 332, A.I.R. 1931 Pat. 210, 133 I.C. 169.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Waste by mortgagor in possession.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one half, the amount for the time being due on the mortgage.

The equitable principle enunciated in this section is applicable to the Punjab—*Bhagwan Dei v. Secretary of State*, 124 P.L.R. 1902.

398. Security rendered insufficient:—A mortgagor in possession can *prima facie* exercise the ordinary right of an owner in possession, save that he should not commit any act which will be destructive or permanently injurious to the property, and which will thereby render the security insufficient—*Tana Peena v. Mamakkantakath*, 8 L.B.R. 413, 34 I.C. 24 (25). Therefore, the mortgagee is entitled to maintain an action for damages for any act done by the mortgagor or by his authority essentially impairing the inheritance, such as cutting timber, tearing down houses, fixtures and the like, although such fixtures may have been placed on the premises by the mortgagor after the making of the mortgage, and likewise against strangers whose wrongful acts affect injuriously the mortgage security—*Aiyappa Reddi v. Kuppusami Reddi*, 28 Mad. 208. The mortgagor may also be restrained by *injunction* if he attempts to remove valuable fixtures where such removal is likely to reduce the value of the security—*Ackroyd v. Mitchell*, (1860) 3 L.T. (N.S.) 236.

399. Acts of waste:—The following have been held to be acts of waste which permanently impair the value of the security:—

(a) Minings under bindings so as to endanger their stability—*Dugdale v. Robertson*, 3 Jur. (N.S.) 627.

(b) Removal of valuable fixtures—*Ackroyd v. Mitchell*, 3 L.T. (N.S.) 236.

(c) The cutting of timber—*Usborne v. Usborne*, 1 Dick. 75; *Aiyappa v. Kuppusami*, 28 Mad. 208 (cited above); even though the timber be ripe for cutting and may deteriorate if left standing, still the cutting of such timber is an act of waste—*Harper v. Aplin*, (1886) 54 L.T. 483.

(d) Working new mines—*Clavering v. Clavering*, 2 Eq. Cas. Abr. 757.

Onus of proof:—When the mortgagor does any act which is likely to prove destructive or permanently injurious to the mortgaged property, the *onus* lies on the mortgagor or his representative to prove that the act is lawful and valid and that the security has not been rendered insufficient—*Bhagwan Dei v. Secretary of State*, 85 P.R. 1902, 124 P.L.R. 1902.

400. Explanation:—The Explanation is the same as that appended to sec. 10 of the Indian Easements Act. It follows an old distinction made in England between land and houses. See *King v. Smith*, 2 Hare 239; *Usborne v. Usborne*, 1 Dick. 75. "This Explanation lays

down an authoritative rule for the purpose of determining the sufficiency of a security, based on the practice of the prudent man of business not to lend money on mortgage unless the property is worth at least one-third more than the amount of the loan. If the property consists of houses which are subject to many casualties from which land is free, the ideally prudent mortgagee would seldom lend more than half the value of the building"—Ghose's *Law of Mortgage*, 5th Edn., p. 217.

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become *due* to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court *a decree* that the mortgagor shall be absolutely debarred of his right to redeem the property, or *a decree* that the property be sold.

A suit to obtain *a decree* that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

- (a) to authorise any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or
- (b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for sale of the property, to institute a suit for foreclosure; or
- (c) to authorize the mortgagee of a railway, canal, or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or
- (d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage,

Amendment:—The following changes have been made by sec. 31 of the Transfer of Property Amendment Act (XX of 1929):—

(1) The word 'due' has been substituted for 'payable.' "For the reasons stated in the notes under sec. 60, the word 'payable' should be replaced by the word 'due' "—*Report of the Special Committee*. See Note 359 under section 60.

(2) The word 'decree' has been substituted for 'order' in several places, as the old practice of passing an *order absolute* has been abolished by the enactment of O. 34, C. P. Code, under which a final *decree* is now passed in a mortgage-suit. See Note 373 under sec. 60.

(3) Clause (a) has been redrafted. The old clause stood as follows:—

"(a) to authorize a simple mortgagee as such to institute a suit for foreclosure, or a usufructuary mortgagee, as such, to institute a suit for foreclosure or sale, or a mortgagee by conditional sale, as such, to institute a suit for sale;"

The present clause (a) gives the following remedies to the mortgagees in respect of the several classes of mortgages:—

(a) Simple mortgage:—Remedy by sale, and not by foreclosure. This was so under the old section.

(b) Mortgage by conditional sale:—Foreclosure, and not sale. The remedy was the same under the old section.

(c) Usufructuary mortgage:—No foreclosure or sale. Under the old section the law was the same.

(d) English mortgage:—Sale only, and *not foreclosure*. Under the old section the remedy was both by foreclosure and sale.

(e) Equitable mortgage:—Sale only and *not foreclosure*. There was no express provision under the old section 59.

(f) Anomalous mortgage:—Ordinarily, sale; foreclosure allowed, if it is provided by the terms of the mortgage.

The reasons for the amendment have been thus stated in the *Report of the Special Committee* (1927):—

"Under the present law [*i.e.*, before amendment] the remedy by way of foreclosure is open to a mortgagee in the case of a mortgage by conditional sale and in an English mortgage, as also in anomalous mortgages, by the terms of which the mortgagee is entitled to foreclosure. By rule 4 (2) of Order XXXIV of the Code of Civil Procedure, the Courts in India have been empowered, when a suit is brought for foreclosure, to direct a sale in lieu of foreclosure. The discretion conferred by that rule on the Courts have been exercised in different ways, some Courts refusing foreclosure, while others have granted it. We understand that in Allahabad foreclosure decrees are more frequent. As to equitable mortgages by deposit of title deeds also, a different practice prevails in different Courts. In Calcutta and Allahabad the Courts have invariably refused foreclosure in such cases (24 Cal. 348; 14 All. 238), while in Bombay foreclosure decrees are sometimes passed (14 Bom. 269).

"The question is discussed by the late Sir Rash Behari Ghose in the 5th Edition of his *Law of Mortgage*, at p. 32, where he says:—

'But although sales take place more frequently now, foreclosure is still a common method of working out the rights of mortgagees in England. I may, however, be permitted to observe that in complicated cases, the rights of the parties can be adequately

protected only by a decree for sale; foreclosure being both a cumbrous and dilatory method of procedure. When the Transfer of Property Act was under consideration, it was proposed in this country to do away with foreclosure altogether, and to give the mortgagee only the right to realise his security by a sale of the pledge. But it was thought by the then Law Member of the Governor General's Council that the amount of simplicity which would be thus gained would not justify the amount of disturbance which would be created by such a change in the law. I, however, venture to doubt whether the slight disturbance which would have been created by such a law would have been too dear a price to pay for the elegance and simplicity which such a measure would have given us. At any rate the gain to the community would have been a sufficient compensation for any possible disturbance. The right of a mortgagee to foreclosure, we should remember, naturally grew in England out of the form of an English mortgage, which consists of a transfer of ownership, accompanied by a condition for retransfer upon due payment of the debt, probably the rudest method, as Professor Holland points out, in which security can be given for the fulfilment of an engagement. In many of the States of America, as well as in Ireland, sale is regarded as the most appropriate remedy on a mortgage. The same practice is followed in countries which have adopted the Roman law as the basis of their jurisprudence. In English law, however, the more cumbrous mode of proceeding has stood its ground down to the present day, but it may be affirmed without much temerity that foreclosure with its successive periods of redemption, its liability to be reopened, and the manifest inadequacy of the remedy in complicated cases, is doomed even in England.'

"In Wiltsie on Mortgage Foreclosure, Vol. I, p. 5, 3rd Edn. (an American work), it is observed:—

"Strict foreclosure or foreclosure without a sale was a procedure greatly used in England at one time and its purpose was to perfect in the mortgagee an absolute title, instead of to obtain a decree for sale; the Courts in most States recognise this method, but allow its use only in exceptional cases, owing to its severity upon the rights of the owner of the equity of redemption.'

"We, therefore, consider it desirable to confine the remedy of foreclosure to the case of a mortgage by conditional sale or an anomalous mortgage where, by the express terms of the deed, the parties have stipulated for foreclosure; and to disallow it in all other cases."

403. Mortgage-money:—'Mortgage-money' does not mean the whole of the mortgage-money; if a mortgage is payable by instalments, it is open to a mortgagee to bring a suit for foreclosure for an instalment of the principal and interest—*Karnidan v. Meghraj*, 11 N.L.R. 153, 30 I.C. 981.

Where a usufructuary mortgagee, instead of taking possession of the mortgaged property granted a lease of the property to the mortgagor, the amount of rent payable under the lease being exactly the amount of

interest payable under the mortgage, and the mortgage-deed contained a covenant to the effect that any arrears due by the lessee would be a charge on the mortgaged property, *held* that the two deeds formed one transaction, that the arrears of rent were therefore included in the mortgage-money, and that the mortgagee would be entitled to a decree for sale not only for the principal money but for the arrears of rent (interest) as well—*Altaf Ali v. Lalta Prasad*, 19 All. 496 (498, 499); Cf. *Imdad Hasan v. Badri Prasad*, 20 All. 401 (407) cited in Note 369 under sec. 60. See also *Jafar Husen v. Ranjit*, 21 All. 4 (9), and *Ramarayaningar v. Maharaja*, 50 Mad. 180 (P.C.). But see 27 All. 313.

404. When mortgage-money becomes due:—Neither sec. 67 nor any other section in this Act lays down any provision in regard to the time when the mortgage-money is to become due. It is to be determined in each case upon the terms of the contract between the parties—*Raghubir v. Kunwar Rajendra*, 8 Luck. 488, 144 I.C. 279, A.I.R. 1933 Oudh 237 (238). It is an elementary proposition that the mortgagee is not entitled to foreclose (or to bring a suit for sale) before the mortgage-money becomes due, the right of the mortgagee to enforce his security being correlative with the right of the mortgagor to redeem. When a mortgage contains a covenant not to redeem for a fixed period, the mortgagee cannot foreclose before the expiration of the term—*In re Hone's Estate*, (1875) Ir. R. 8 Eq. 65. See Note 359 under section 60.

Where no time is fixed for payment, the mortgage becomes payable on the date of execution—*Nilcomal v. Kamini Kumar*, 20 Cal. 269 (272). Where a mortgage is payable 'on demand,' and fixes no time for payment, the mortgage is deemed to be payable forthwith from the date of execution of the mortgage, no previous demand by the mortgagee being necessary—*Barkatunnissa v. Mahboob Ali*, 42 All. 70 (73). But it is equitable that the mortgagee must give reasonable notice to the mortgagor to enable him to find the money—*Toms v. Wilson*, (1862) 4 B. & S. 442; *Brightly v. Norton*, (1862) 32 L.J.Q.B. 38; *Fitzgeralds' Trustee v. Mellersh*, (1892) 1 Ch. 385 (390); *Moore v. Shelley*, (1883) 8 App. Cas. 285.

A hypothecation bond stipulated that the principal was to be paid in two years and the interest in the meantime monthly; it further provided that on default in the payment of interest, the principal with interest would become payable 'on demand.' *Held* that as soon as default was made in the payment of interest in any month, the money became due forthwith, and no actual demand was necessary to complete the plaintiff's cause of action—*Perumal v. Alagirisami*, 20 Mad. 245 (248). But if the bond provided that in default of payment of interest, the principal would become due with interest *at an enhanced rate on demand* by the obligee, the cause of action did not arise until a demand was actually made by the plaintiff—*Nellakaruppa v. Kumarasami*, 22 Mad. 20 (22).

It has been held in two cases that if a mortgagee, who is entitled to obtain possession, fails to get possession of the mortgaged property, he has a right to sue for the mortgage money under sec. 68; that is, the mortgage-money 'becomes payable'; and he is entitled to sue under this section either for foreclosure or for sale, as the case may be—*Sita Nath v. Thakurdas*, 46 Cal. 448 (454); *Subbamma v. Narayya*, 41 Mad. 259 (264) (F.B.). But this is no longer good law; because clause (d) of sec. 58, as now amended, makes it clear that a usufructuary mortgagee does not cease to be a usufructuary mortgagee by reason of the fact that

possession has not been delivered to him by the mortgagor; consequently he is not entitled to the remedy either of foreclosure or of sale, by virtue of clause (a) of this section. See Note 342 under sec. 58.

When mortgagee may sue before expiry of the term:—Ordinarily, when a mortgage-deed fixes a period for payment, the mortgage-money becomes due on the expiry of the stipulated period. But if the mortgage-deed also gives the mortgagee an option to recover his money before that period, the mortgage-money becomes due as soon as the mortgagee has exercised the option given to him. Where a mortgage-deed provided that if two instalments of six-monthly interest be not paid in full, the mortgagee would have the option, before the expiry of the period fixed, to recover the whole of the amount due through Court, *held* that the mortgagee could exercise his option when the mortgagor committed default—*Raghubir v. Kunwar Rajendra*, 8 Luck. 488, 144 I.C. 279, A.I.R. 1933 Oudh 237 (238, 239). Where a deed of mortgage by conditional sale provided that the mortgage amount would be paid in two instalments, that if the mortgagor failed to pay at the stipulated time, he would pay compound interest, and that if the amount was not paid as stipulated the mortgage would be foreclosed, *held* that the parties intended that there should be foreclosure only after failure to pay the whole amount due in the manner stipulated, *i.e.*, on failure to pay the whole amount on the due date of payment of the *second* instalment, and it was not the intention of the parties that the mortgagee could foreclose as soon as there was a default of payment of the first instalment, and before the second instalment fell due. The failure to pay the first instalment was sufficiently provided for by the condition for compound interest, and did not entitle the mortgagee to sue before the whole amount was payable—*Karnidan v. Maghraj*, 11 N.L.R. 153, 30 I.C. 981 (982). Compare *Kannu v. Natesa*, *infra*. But if a mortgage-bond contains a stipulation that “if the property be found to have been mortgaged or transferred to any one or if there should arise any case which might be considered likely to cause total or partial loss of this principal money and interest, the mortgagee shall have power to realise the entire mortgage-money from the mortgagor and from his property without waiting for the expiration of the term,” *held* that such a covenant would enable the mortgagee to recover his mortgage-debt before the expiry of the term in the event of the discovery of a prior mortgage or of anything which may be considered likely to cause loss of the debt—*Bhawani v. Sheodihal*, 26 All. 479 (481). Where by a deed of mortgage a mortgagor covenanted to repay the principal within one year and the interest every month, and on default in paying interest, to pay both at once, *held* that as soon as a default was made in the payment of interest, both the principal and interest became payable at once and the suit could be instituted forthwith without waiting for the expiry of the year—*Yeo Htean v. Abuzaffar*, 27 Cal. 938 (P.C.).

Where the mortgagee found that some of the properties mortgaged did not belong to the mortgagor and the latter failed to furnish additional security, the mortgagee could sue under this section even before the mortgage-money became due—*Venkat Rao v. Mahableshwar*, 26 Bom. 241 (245).

Suit for interest before principal money is due:—Where a mortgage document provided for payment of interest every month and for enhanced interest on default, *held* that there was a ‘contract to the contrary’ within

the meaning of this section, and a suit for interest was maintainable even before the principal money became due. But a mortgagee cannot sue for interest before the principal amount becomes payable, if there is an absolute covenant prohibiting him from so suing. But if there is no such covenant, then although the principal may not become payable for a considerable time, the mortgagee is entitled to sue for the interest without waiting for the due date—*Subbiah v. Kuppammal*, 31 M.L.J. 437, 35 I.C. 104 (105). In England the law is the same. If there is a covenant not to call in the money during a certain period, no default in payment of interest will enable the mortgagee to sue; but if there is no such covenant, the mortgagee can sue at any time after default of payment of interest, however distant the day on which the payment of the principal money is reserved—*Burrows v. Molloy*, (1845) 69 R.R. 358, 2 Jo. & Lat. 521; *Edwards v. Martin*, (1856) 25 L.J. Ch. 284, 105 R.R. 279; *Stanhope v. Manners*, (1763) 2 Eden 197. Failure to pay interest at the stipulated time would, in a mortgage prepared in the most ordinary form, release the mortgagee from the necessity of waiting for the expiry of the term—*Seaton v. Twyford*, (1870) L.R. 11 Eq. 591. Where a deed provided that the mortgage-debt was to become payable at the expiration of 15 years, and that in the meantime interest was to be paid yearly, *held* that the failure on the part of the mortgagor to pay the stipulated interest as agreed upon would entitle the mortgagee to bring the mortgaged property to sale before the expiry of the term of the mortgage—*Venkatarao v. Mahableshwar*, 26 Bom. 241 (245), following *Seaton v. Twyford*, *supra*. But where the mortgage bond provided that in default of payment of interest at 8 per cent. on the due dates interest at 9 per cent. should be charged on the interest in arrears as well as on the principal, it was held that the true intention of the parties was to postpone the sale of the mortgaged property until the principal became due, and to give the mortgagee, on default of payment of interest, only a right to the enhanced rate of interest on the principal and on the arrears of interest, and that the mortgaged property could not be brought to sale for arrears of interest before the principal was due—*Kannu v. Natesa*, 14 Mad. 477.

"Before mortgage money has been deposited":—Where the mortgage-money was deposited by the mortgagor and a notice was issued under sec. 83, but before it was served on the mortgagee, he filed a suit: *held* that the mortgagee would not be debarred from obtaining a decree with costs—*Sitaramayya v. Venkataramanna*, 11 Mad. 371. See this subject discussed in Note 504 under sec. 83.

405. Instalment mortgage-bond:—In the absence of an express stipulation, a mortgagee is not bound to receive payment by instalments—*Behari v. Ram Gholam*, 24 All. 461.

Where the amount is stipulated as payable in instalments, and the mortgagor personally covenants to pay each instalment as it falls due, the mortgagee is clearly entitled to sue him for the recovery of each instalment remaining unpaid by sale of the mortgaged property and personally from the mortgagor. This right is not curtailed by the fact that there is a further provision in the mortgage-deed entitling the mortgagee to take possession of the mortgaged property if at the end of the date fixed for the last instalment the debt remains wholly unsatisfied—*Ramayya v. Venkatarama*, 13 M.L.J. 2.

If the mortgagee has accepted irregular payments of instalments
r—52.

without objection, he must be taken to have waived his right to enforce the payment of the whole amount, which he had an option to enforce under the deed—*Sakhawat v. Gajadhar*, 28 All. 622.

406. Money decree—Execution against mortgaged property:—A mortgagee can obtain a simple money-decree on his mortgage; but he can not, by virtue of sec. 99 (now O. XXXIV, r. 14 of the C. P. Code) bring the mortgaged property to sale except by instituting a suit under this section—*Ram Keshab v. Sonatun*, 2 C.W.N. 320; *Madho Prosad v. Baij Nath*, 2 A.L.J. 356; *Shib Das v. Kali Kumar*, 30 Cal. 463; *Babu Lal Sahu v. Ram Parshad*, 7 O.C. 314; *Ram Proshad v. Ram Prashad*, 4 O.C. 231; *Kaveri v. Ananthayya*, 10 Mad. 129. In this respect the law before and after the passing of the C. P. Code (1908) is the same.

But if the mortgagee obtains a money-decree on a claim not arising under the mortgage, can the mortgagee bring the mortgaged property to sale in execution of the decree, without instituting a regular suit under this section? In this respect the law has undergone a change after the passing of the C. P. Code of 1908 and the re-enactment of sec. 99 of the T. P. Act as O. XXXIV, r. 14 of the Code. Under the previous law, a mortgaged property could not be sold in execution of such a decree (though it could be attached) except by instituting a suit under this section—*Jadub Lal v. Madhab Lall*, 21 Cal. 34; *Chundra Nath v. Burroda Shoondury*, 22 Cal. 813; *Durgayya v. Anantha*, 14 Mad. 74; *Sethuvayyan v. Muthusami*, 12 Mad. 325; *Kaveri v. Ananthayya*, 10 Mad. 129; *Azimullah v. Naimunnessa*, 16 All. 415. But now as sec. 99 has undergone certain amendments in O. XXXIV, r. 14, the above prohibition will no longer attach to the procedure, and there will be no longer any impediment in the way of the mortgagee bringing the mortgaged property to sale in execution of a decree obtained otherwise than under his mortgage. (See this subject fully discussed under O. XXXIV, r. 14 in the Appendix).

407. Decree creating charge on property—Execution against the property:—Where a decree creates a charge on a property, the property cannot be sold solely in pursuance of that decree. It will be necessary to bring a fresh suit for sale under this section before the property can be brought to sale—*Rameshar v. Subbakaran*, 8 A.L.J. 418. Where a consent decree orders payment of the decretal amount by instalments and creates a charge on the estate of the judgment-debtor, the judgment-creditor is precluded from selling the properties in execution proceedings. He is bound to file a fresh suit under this section for bringing the properties to sale—*Aubhoyessury v. Gouri Sunkur*, 22 Cal. 859. When a charge is created by a decree for maintenance, the enforcement of the same can only be effected by instituting a suit under this section—*Matangini v. Chooneymoney*, 22 Cal. 903. Where a suit for sale upon a mortgage instituted under this section is compromised and a simple money-decree is passed, the decretal amount being made a charge upon the property, *held* that sec. 99 (O. 34, r. 14) will prevent the property from being brought to sale in execution of such a decree, but the mortgagee must institute a second suit upon his decree under this section—*Hem Ban v. Behari Gir*, 28 All. 58.

408. Clause (a)—Rights of simple mortgagee:—In a simple mortgage, there being no transfer of ownership, the simple mortgagee can bring the mortgaged property to sale only through Court—*Papamma*

v. Vira Pratapa, 19 Mad. 249 (252) (P.C.). He cannot sue to obtain possession of the property; he can only sue for sale. If the Court erroneously gives him possession, that possession does not amount to foreclosure, and the mortgagor can subsequently redeem the mortgage—*Ibid* (at pp. 252, 253).

The mortgagee is entitled to bring the mortgaged properties to sale in any order he chooses. The Court cannot scrutinize his motives—*Subba Rao v. Lakshminarayana*, 22 L.W. 389, A.I.R. 1925 Mad. 1214, 92 I.C. 593.

Where in a simple mortgage it was provided that if the mortgagor failed to pay the interest in any year (the interest being payable annually) or any instalment of principal (in case of an instalment mortgage-bond), the mortgagee would be entitled to take possession of the property, *held* that the mortgagee would be able either to bring a suit for sale or to sue for possession, on default of payment by the mortgagor; his remedy was not limited to a suit for possession—See *Lingam Krishna v. Sri Mirza*, 21 M.L.J. 1147 (P.C.), 15 C.W.N. 441 and other cases cited in Note 336 under sec. 58. In other words, a simple mortgagee does not lose his statutory remedy of bringing the property to sale by the mere fact of his stipulating for an additional remedy.

Appointment of Receiver:—The Patna High Court has held that a simple mortgagee has merely the right to sue upon the personal covenant or to bring the mortgaged property to sale; he cannot satisfy his claim out of the rents and profits of the property; he has no right to possession and no right to apply for the *appointment of a Receiver*—*Nrisingha v. Rajniti*, 13 P.L.T. 525, A.I.R. 1932 Pat. 360 (362). But the Calcutta High Court is of opinion that though a mortgagee under a simple mortgage is not entitled to possession, still he may invite the Court to appoint a Receiver, if the demands of justice require that the mortgagor should be deprived of possession—*Rameshwar v. Chuni Lal*, 47 Cal. 418 (424). If the mortgagee is a mortgagee by conditional sale and he obtains a decree for foreclosure, a receiver cannot be appointed at his instance. But if it is a simple mortgage and the decree is one for sale, and it is established that the security is not sufficient to satisfy the judgment-debt, a Receiver will be appointed as a matter of course, specially if there had been a default in the payment of interest. See *Rameshwar v. Chuni Lal*, *supra*; *Khub-surat v. Saroda*, 14 C.L.J. 526, 12 I.C. 165. The Madras High Court was previously opposed to the appointment of a Receiver—*Venkata Rajagopala v. Basivi Reddy*, 1914 M.W.N. 771, 26 I.C. 986; but in a recent case it has expressed the opinion that where a mortgagor is personally bound to pay the debt as in a simple mortgage, and either he has defaulted to pay the interest while enjoying the property or the property has diminished in value so as not to be sufficient to satisfy the whole debt, the mortgagee may in a suit on the mortgage obtain a Receiver for the taking of the rents and profits of the mortgaged property and paying them into Court for the benefit of the mortgagee and so deprive the mortgagor of possession ever before the sale. The same would be the case if the mortgagor is damaging or wasting or not taking proper care of the property—*Ramaswami v. Paramasivan*, 1933 M.W.N. 29, A.I.R. 1933 Mad. 447 (448, 449), 143 I.C. 650. But where there is no personal covenant to pay or where it has become barred or where the mortgagee has deliberately given it up and therefore the decree does not contemplate a personal decree for any deficiency found at the sale, a Receiver cannot be appointed—*Ramaswami v. Paramasivan*, *supra*.

409. Rights of usufructuary mortgagee:—A pure usufructuary mortgagee can sue neither for foreclosure nor for sale, since his contract is to realise his security out of the usufruct of the property—*Subbamma v. Narayya*, 41 Mad. 259 (263) (F.B.). As there is no covenant or agreement for payment in a usufructuary mortgage, the mortgagee cannot compel payment of the mortgage money by a suit for sale—*Chathu v. Kunjan*, 12 Mad. 109 (110); *Luchmeshar v. Dookh Mochan*, 24 Cal. 677 (681). [In the old clause (a) it was provided that a usufructuary mortgagee was not entitled to bring a suit for “foreclosure or sale”; and in an early Madras case, these words were interpreted to mean a suit in which the plaintiff prayed for a decree for foreclosure or for sale in the alternative, in *one suit*. In other words, it was decided that this clause prohibited a usufructuary mortgagee from bringing a suit in which he prayed alternatively for a decree for foreclosure or for sale; but that there was nothing to prevent him from bringing a suit for foreclosure or from bringing a suit for sale—*Venkatasami v. Subramanya*, 11 Mad. 88 (90). The language of the present clause is perfectly clear and does not admit of such ingenious interpretation.]

But where the mortgagor makes a *personal covenant* to pay the money on a certain date, the transaction ceases to be a purely usufructuary mortgage, and becomes what is known as *simple mortgage usufructuary*, i.e., a combination of a simple and a usufructuary mortgage, and the mortgagee is entitled to bring a suit for sale—*Ramayya v. Guruva*, 14 Mad. 232 (234); *Sivakami v. Gopala*, 17 Mad. 131 (133) (F.B.); *Chathu v. Kunjan*, 12 Mad. 109 (112); *Udayana v. Senthivela*, 19 Mad. 411; *Kangayya v. Kalimuthu*, 27 Mad. 526 (527) (F.B.); *Rangappa v. Thammayappa*, 26 M.L.J. 514, 24 I.C. 372; *Mahadaji v. Joti*, 17 Bom. 425; *Umda v. Umra Begum*, 11 All. 367; *Jafar Hussain v. Ranjit Singh*, 21 All. 4 (8); *Parashram v. Putlajirao*, 34 Bom. 132 (135); *Dattambhat v. Krishnabhat*, 34 Bom. 462 (466); *Jag Sahu v. Ram Sakhi*, 1 Pat. 350 (355), A.I.R. 1922 Pat. 167; *Sardar Singh v. Collector*, 10 O.C. 14; *Ram Khilawan v. Ghulam*, 8 Luck. 190, A.I.R. 1933 Oudh 35 (36), 141 I.C. 464; *Pargan Panday v. Mahatam Mahto*, 6 C.L.J. 143; *Fida Ali v. Ismailji*, 6 N.L.R. 20, 5 I.C. 701. (But in *Kashi Ram v. Sardar Singh*, 28 All. 157 it has been held that in order to entitle a usufructuary mortgagee to sue for sale of the property, there must be not only a personal covenant to pay the money but also an express stipulation in the deed entitling the mortgagee to recover the money by sale of the property). It is submitted, however, that under the new clause (g) of sec. 58, a combination of a simple and usufructuary mortgage would fall under the definition of an anomalous mortgage, and if that is so, the rights and liabilities of the parties would be determined by the term of the contract of mortgage. If the terms do not provide for sale, a suit for sale is not maintainable. See also *Lal Narsingh v. Yakub*, 4 Luck. 363 (P.C.), 56 I.A. 299, 33 C.W.N. 693, commented on in Note 415 under sec. 68.

If a usufructuary mortgage contains a covenant to pay on a certain date, coupled with a further stipulation that “if the money be not paid by the executant in due time, then this bond will remain in force and intact (i.e., the mortgagee will continue in possession) till the repayment of the money, with all conditions set forth herein,” *held* that this stipulation did not amount to an *absolute* covenant to repay; consequently the mortgagee was not entitled to sue for sale, upon the mortgagor’s failure to pay on

the date fixed—*Kamal Nayan v. Ram Nayan*, 11 P.L.T. 74, 120 I.C. 308, A.I.R. 1930 Pat. 152.

In a Madras Full Bench case it was held that a usufructuary mortgagee was entitled to sue for sale of the property mortgaged to him, when the mortgagor failed to deliver possession of the said property to him—*Subbamma v. Narayya*, 41 Mad. 359 (F.B.) (overruling *Samayya v. Nagalingam*, 15 Mad. 274 and *Arunachalam v. Ayyavayan*, 21 Mad. 476). The reason for this decision was that a mortgagee could not be called a usufructuary mortgagee if the mortgagor had not given him possession of the mortgaged property so as to enable him to realise his security out of the rents and profits; and consequently proviso (a) of this section did not apply and he could sue for sale or foreclosure—*Ibid.* But this decision is no longer good law by reason of the addition of the words “or expressly or by implication binds himself to deliver possession” in clause (d) of sec. 58. The effect of this amendment is that a usufructuary mortgagee, notwithstanding that possession has not been given to him, does not cease to be a usufructuary mortgagee. See Note 342 under sec. 58. A usufructuary mortgagee who has been dispossessed of the mortgaged property has no remedy either by foreclosure or by sale, but his remedy is confined only to a money-decree against the mortgagor (under sec. 68)—*Lazarannessa v. Mahomed Jafar*, 13 I.C. 336 (Cal.); *Aghore Nath v. Natabar*, 41 I.C. 406 (Cal.); if, however, the usufructuary mortgage-deed expressly provides that upon failure to get possession the mortgagee should be entitled to recover the amount due by sale of the mortgaged property, then of course the Court will grant a decree for sale of the property, if the mortgagee is dispossessed—*Bhabani Charan v. Kadambini*, 33 C.W.N. 279 (280), 119 I.C. 292, A.I.R. 1929 Cal. 304; *Narpat v. Ram Saran*, 30 All. 162.

410. Rights of mortgagee by conditional sale:—Where the mortgage is by conditional sale, the only decree that can be made is for foreclosure and *not for sale* of the mortgaged property. The mortgagee is not entitled to institute a suit for sale, for the contract provides for the mortgage ripening into a sale in default of payment and implies an intention on the part of the mortgagee to take the mortgaged property in satisfaction of the debt when that event has happened. His remedy is accordingly confined to a suit for foreclosure—*Venkatasami v. Subramanya*, 11 Mad. 88 (89); *Kalika v. Ajudhia*, 51 All. 780, 1929 A.L.J. 448, A.I.R. 1929 All. 421 (428), 121 I.C. 211.

411. English mortgage:—A decree for sale may be made in favour of the mortgagee when the mortgage is an English mortgage—*Askaran v. Gobordhan*, 26 C.W.N. 318, A.I.R. 1922 Cal. 52, 70 I.C. 158. Under the old section the mortgagee was entitled to a decree for *foreclosure*. This remedy has now been taken away.

411A. Equitable mortgage:—Clause (a) now provides that the remedy of a mortgagee by deposit of title-deeds is to bring a suit for sale and not for foreclosure. See also *Sreenath v. Gadadhar*, 24 Cal. 348; *Oo Nong v. Maung*, 13 Cal. 322 (326); *Radiar Rahman v. Chetty Firm*, 8 L.B.R. 450, 35 I.C. 288; see also *Marcar v. Sigg*, 2 Mad. 239 (255) (P.C.). In Bombay, a decree for foreclosure was allowed—*Manekji v. Rustomji*, 14 Bom. 269. But this is no longer good law. An equitable mortgage stands on the same footing as a simple mortgage. Cf. sec. 96.

An equitable mortgagee can apply for the appointment of a Receiver. See *Nrisingha v. Rajniti*, 13 P.L.T. 525, A.I.R. 1932 Pat. 360 (362); *Venkata Kumara v. Gokuldoss*, 54 Mad. 565, 133 I.C. 504, A.I.R. 1931 Mad. 626.

412. Clause (c):—*No foreclosure or sale in respect of mortgage of railway, etc:*—The exemption in this clause is founded on a consideration of the inconvenience which would be caused to the public by the sale or foreclosure of a work constructed and maintained for the convenience of the public—*Furness v. Caterham Ry. Co.*, 25 Beav. 614.

The remedy of the mortgagee in these cases would be to have a receiver appointed. See Select Committee's Report, 2nd Feb. 1878, para. 25.

413. Clause (d): No foreclosure or sale as to portion of mortgaged property:—This clause, like para. 5 of sec. 60, is an illustration of the rule of indivisibility of a mortgage. It is an established principle that the *whole* of the mortgaged property is liable for any and every portion of the mortgage-debt, however small—*Arunachalam v. Ramasamy*, 30 L.W. 723, 112 I.C. 501, A.I.R. 1928 Mad. 933 (935). This section does not prohibit a person interested in part only of the mortgage-money from instituting a suit to recover his share of the mortgage-money, provided he frames his suit in such a way as to relate to the *whole* of the mortgaged property and not to a corresponding *part* of the property. All that this section prohibits is his bringing a suit relating only to a part of the mortgaged property. If he frames his suit (for recovery of his share of the mortgage-money) praying his relief for foreclosure or sale so as to operate upon the *whole* of the property, the obstacle of this section disappears. A person interested in part of the mortgage-money may sue for the whole of the mortgage-money or for his portion of the money. Where, for example, the other co-mortgagees consent or relinquish or assign their shares in his favour he may sue for the whole of the debt. If the others do not consent, they may be made party defendants, and he can sue to recover his share of the debt, but he must take care to see that he proceeds against the whole of the mortgaged property—*Seth Bansiram v. Naga Ayyar*, 59 M.L.J. 928, A.I.R. 1930 Mad. 985, 129 I.C. 45. By enacting this rule, the Legislature has intended to protect the mortgagor from being harassed by a multiplicity of suits where the severance of the interests of the mortgagees has taken place without the consent of the mortgagor—*Vijayabhushanammal v. Evalappa*, 39 Mad. 17 (20). But there is nothing to prevent a *sole* mortgagee from foreclosing the mortgage as a whole by proceeding against a part only of the mortgaged property, and abandoning the remainder of his security—*Sheo Tahal v. Sheo Dan*, 28 All. 174 (F.B.). So also, it is competent for a sole mortgagee to abandon a part of his security and sue for the sale of the remainder—*Sheo Prasad v. Behari Lal*, 25 All. 79. Where portions of the mortgaged property have, subsequently to the mortgage, passed to different owners, the mortgagee, provided that he himself has not been a party to the destroying of the integrity of the mortgage, is entitled to realise his whole debt from any portion of the mortgaged property—*Soti Suraj Mal v. Than Singh*, 41 All. 146 (150), 19 A.L.J. 917.

So also, a *purchaser* of the mortgage-right of one of the joint mortgagees cannot bring a suit for sale of a portion of the mortgaged property

in respect of his share of the mortgage-debt—*Parsotum v. Mulu*, 9 All. 68; *Laljee v. Jangilal*, 1887, A.W.N. 233.

Where there has been a severance of the interests of the mortgagees with the consent of the mortgagor, one of several mortgagees is entitled to enforce by suit the payment of his portion of the mortgage money—*Vijayabhushanammal v. Evalappa*, 38 Mad. 17 (19). This section is unhappily worded, because it refers only to severance of the interests of the mortgagees with *the consent of the mortgagor*. But this principle can be extended to cases where the severance of the interests of the mortgagees takes place in any other lawful mode legally binding on the mortgagor. Thus, a mortgage-debt can be said to be severed under this clause where in a suit brought by one of the co-mortgagees for his share of the debt in which the mortgagor was also a party, the *Court passed a decree* for sale to recover his share of the debt, though the mortgagor did not give his consent to the passing of the decree. In such a case, the decree effecting the severance must be as effective legally as the mortgagor's consent to the severance. On the basis of such severance, another co-mortgagee can legally maintain a suit to recover his share of the mortgage-debt—*Vijayabhushanammal v. Evalappa*, 39 Mad. 17 (20), 25 I.C. 91. Where one of two mortgagees, each having a half share in two simple mortgages, took a usufructuary mortgage of the whole of the mortgaged property from the mortgagors, the consideration being the amount of his share in the two simple mortgages, *held* that there was a severance of interests, and the other mortgagee was entitled to recover his share of the amount due under the simple mortgages—*Jauhari Singh v. Ganga Sahai*, 41 All. 631 (634), 17 A.L.J. 731, 51 I.C. 107. Similarly, where the co-mortgagors made a partition of the mortgaged property by mutual consent and agreed with one another that each would be responsible only for his share and that the portion of the mortgaged property allotted to each should bear that much only of the debt, it would be competent to the mortgagee, should he be so minded, to accept this arrangement as between the co-mortgagors, and validly release each mortgagor on payment of his quota of the debt, and proceed against such of them as might make default for what is due by them according to the arrangement—*Venkatachella v. Srinivasa*, 28 Mad. 255; *Mahadaji v. Ganpatshet*, 15 Bom. 257. But the mere acceptance by the mortgagee from one of the mortgagors of payment of his portion of the debt does not sever the mortgage, and the mortgagee cannot be allowed to foreclose the shares of the remaining mortgagors for the remaining portion of the debt—*Chandika v. Pohkar*, 2 All. 906.

Where a mortgage is split up, by the sale to the mortgagee of the equity of redemption of a portion of the property mortgaged, the mortgagee can foreclose, in respect of the portion not sold to him for a proportionate amount of the mortgage-money—*Bisheshar v. Laik Singh*, 5 All. 257 (258). But where there are two mortgagees, and the mortgagor has conveyed the property to one of them without the consent of the other mortgagee, *held* that though the debt due to one mortgagee has been satisfied as the result of the conveyance, still the mortgage has not been split up, and the other mortgagee is entitled to enforce his portion of the debt against the *whole* of the mortgaged property—*Arunachalam v. Ramasamy*, 30 L.W. 723, 1928 M.W.N. 518, A.I.R. 1928 Mad. 933 (935, 939), 112 I.C. 501.

Where there are two mortgagees, and one of them desires to realise the debt, then if the consent of the co-mortgagee cannot be obtained, he may be added as a defendant, and the mortgage-decree will provide for all the necessary accounts and payments, excepting that there can be no judgment for a sum of money entered as between the co-mortgagee-defendant and the mortgagor—*Sunitihala v. Dhara Sundari*, 47 Cal. 175 (179, 180) (P.C.), 24 C.W.N. 297, 53 I.C. 131, A.I.R. 1919 P.C. 24, followed in *Arunachalam v. Ramasamy*, supra.

67A. *A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.*

Mortgagee when bound to bring one suit on several mortgages.

414. This section has been inserted by sec. 32 of the Transfer of Property Amendment Act (XX of 1929). It compels a mortgagee, who holds several mortgages of different dates executed by the same mortgagor to bring a consolidated suit on all the mortgages at one and the same time. His omission to do so precludes him from filing a second suit—*Gadiram v. Punamchand*, A.I.R. 1933 Nag. 171.

Prior to the enactment of this section, there was a conflict of opinion. Thus, it was held in some cases that a mortgagee holding several mortgages over the same property could not sue on one mortgage to obtain an order for sale of the property subject to the other mortgage—*Keshavram v. Ranchhod*, 30 Bom. 156 (163); *Dorasami v. Venkateshayyar*, 25 Mad. 108 (115). He must either enforce both the securities in one suit, or sue on one giving up his rights under the other. If he sued on the first mortgage without mentioning the existence of the second mortgage, and obtained a decree, he was precluded from enforcing the second mortgage in another suit—*Krishnamachariar v. Annangarachariar*, 30 Mad. 353 (355). But in *Sundar Singh v. Bholu*, 20 All. 332, *Nilu Ray v. Asirbad*, 25 C.W.N. 129, 60 I.C. 809, *Tabarak Ali v. Dalip Narain*, 8 P.L.T. 255, A.I.R. 1927 Pat. 117 (120), 98 I.C. 968, and *Dwarka Nath v. Mrityunjoy*, 3 I.C. 175 (176) (Cal.) it was held that a holder of two mortgages over the same property who had obtained a decree for sale in a suit on the prior mortgage was not precluded from instituting a fresh suit on the second mortgage, but he could not sell the property twice over nor sell it under the second decree subject to the first. See also *Subramania v. Balasubramania*, 38 Mad. 927 (939, 940) (F.B.), where it is held that it is open to a mortgagee to bring a suit on a puisne mortgage for sale of the mortgaged property subject to a prior mortgage in his favour, since a mortgagee holding separate mortgages is entitled to treat them as separate causes of action (following *Radhakrishna v. Muthusawmy*, 31 Mad. 530). In *Raghunath v. Jamna Prasad*, 29 All. 233, it was held that a mortgagee holding two deeds of mortgage could institute a suit on one mortgage and bring a portion of the mortgaged property to sale in execution of the decree, and then institute another suit on the other mortgage for sale of the remaining portion of the property.

To avoid this divergence of views the present section has been enacted. The following *Report of the Special Committee* fully explains the reasons:—

“While dealing with section 61, we pointed out that it is inequitable to enforce the principle of the consolidation of securities to the prejudice of a mortgagor. When, however, a mortgagee holds several mortgages in respect of the same or different properties, it will be prejudicial to the mortgagor if the mortgagee is allowed to enforce one mortgage and keep the other mortgages alive. In the case of a number of mortgages in which the only remedy open is foreclosure, the disadvantage of the mortgagor will be very marked as he may lose the whole property in satisfaction of one debt, which may be less than the real value of the property, and will be liable to have a personal decree passed against him in satisfaction of the debts under the other mortgages. In the case of mortgages too where the only remedy is sale, the property will never realise its fair and proper value if it be sold subject to another mortgage. Thus, in 25 C.W.N. 129, where the Calcutta High Court was constrained to hold that the holder of two independent mortgages over the same property, in the absence of a contract to the contrary, was not prevented from obtaining a decree for sale on each of them in a separate suit, it had to add a reservation in the decree that he could not sell the property twice over nor could he sell it under either of the decrees subject to the other. In that case the Court held that the right course to follow in such circumstances was to direct that the property be sold free of both charges, whether in execution of the decree on the first mortgage or of the decree on the second mortgage, and that the balance of the sale proceeds after payment of incidental expenses be applied in discharge of the dues on the first mortgage and the second mortgage one after the other, and that the residue, if any, stand to the credit of the holder of the equity of redemption. This course, although equitable, is not warranted by any provision of the Act or of Order XXXIV, Civil Procedure Code. To avoid such difficulties, we propose a new section to be numbered section 67A.”

This section has no retrospective effect. It does not apply to mortgages created before the 1st April 1930—*V. R. S. Chettiar Firm v. Ya Ya*, A.I.R. 1933 Rang. 377 (378); *Ko Aung v. Ko Po*, A.I.R. 1931 Rang. 208, 131 I.C. 725.

The rule of this section is not applicable where the parties in the two mortgage-deeds are not the same—*Ko Aung v. Ko Po*, *supra*.

68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only—

(a) where the mortgagor binds himself to repay the same;

(b) where the mortgagee is deprived of the whole or part of his security by, or in conse-

r—53.

68. (1) The mortgagee has a right to sue * * for the mortgage-money in the following cases and no others, namely:—

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or

quence of, the wrongful act or default of the mortgagor;

(c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed or the security is rendered insufficient as defined in section 66, the mortgagee may require the mortgagor to give him, within a reasonable time, another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.

default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

~~(d)~~ (d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person *claiming under a title superior to that of the mortgagor*;

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) *Where a suit is brought under clause (a) or clause (b) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mort-*

gagee abandons his security and, if necessary, re-transfers the mortgaged property.

Amendment:—This section has been redrafted by sec. 33 of the T. P. Amendment Act (XX of 1929), but the actual changes are very few. The words “the mortgagor” have been omitted; the last para of the old section is now enacted as clause (b) with certain verbal alterations; clauses (c) and (d) of the new section correspond to clauses (b) and (c) of the old section; the italicised words in clause (d), the proviso and sub-section (2) are new. The reasons are stated below in proper places.

415. Scope of section:—The provisions of this section apply only to mortgages, and not to a charge—*Fatick Chunder v. Foley*, 15 Cal. 492.

The remedy provided by this section is alternative and additional to any to which the mortgagee may be entitled. Thus, if the mortgagor fails to deliver possession to the mortgagee, the latter is not bound to sue under clause (d) of this section but is at liberty to bring a suit for possession—*Sankata v. Jagat Narain*, 2 O.C. 24. The usufructuary mortgagee, who is entitled to possession but does not get possession, may sue at once for the money under sec. 68 instead of suing for possession—*Linga Reddi v. Sama Rau*, 17 Mad. 469 (471). If a mortgagee by conditional sale who is entitled to obtain possession fails to get possession of the mortgaged property, he is not obliged to sue at once for the mortgage-money under sec. 68, but it is open to him to sue for foreclosure under sec. 67—*Sita Nath v. Thakurdas*, 46 Cal. 448 (454). See also sub-section (2).

A Full Bench of the Madras High Court has laid down that the words “sue for the mortgage-money” mean and include a suit for foreclosure or sale under sec. 67. When the mortgagee has become entitled to sue for the mortgage money under any clause of sec. 68, it means that the mortgage-money has become “payable”; and consequently there can be no reason for refusing to give effect to sec. 67 which allows of a suit for foreclosure or sale at any time after the mortgage-money has ‘become payable’—*Subbamma v. Narayya*, 41 Mad. 259 (264) (F.B.). But this proposition does not apply to a usufructuary mortgage. See this case under Note 409 in sec. 67. But if the mortgage is a combination of a simple and usufructuary mortgage, and the mortgagor fails to deliver possession to the mortgagee, the latter can sue for the money under sec. 68, i.e., the money becomes payable; and if the money becomes payable, a decree for sale can be made under sec. 67—*Lal Narsingh v. Yakub*, 4 Luck. 363 (P.C.), 33 C.W.N. 693 (699), 116 I.C. 414, A.I.R. 1929 P.C. 139; followed in *Ram Khilawan v. Ghulam*, 8 Luck. 1190, 141 I.C. 464, A.I.R. 1933 Oudh 35 (36). But it is submitted that under the new clause (g) of sec. 58, such a mortgage would be treated as an anomalous mortgage, and in that view, neither sec. 67 nor sec. 68 would apply, but the rights and liabilities of the parties would be determined by the terms of the mortgage (sec. 98), so that if the mortgage-deed stipulates (as in the above case) that if the mortgagee is dispossessed the mortgagor shall be liable to secure the possession, then upon the mortgagee’s failure to get possession, the mortgagee will be entitled only to a decree for possession and not to a money-decree under sec. 68 or a decree for sale under sec. 67.

A mortgage-bond contained the following terms: "As we have received Rs. 500, you will, in lieu of the said amount and interest, enjoy the said property for three years, and we have executed this *Arakattu otti* on condition that on the expiry of the said three years, we should redeem the land without paying either principal or interest. You will, on the expiry of the said three years deliver possession of the said property without raising any objection." The mortgagee obtained possession of only a part of the land, and when the mortgagor sued to recover possession on the expiry of three years, the mortgagee claimed that as possession of the whole property had not been delivered he was entitled to get back the money under clause (c) of this section before the mortgagor could redeem. *Held* that sec. 68 did not apply. This section contemplates cases in which the mortgagee is entitled to claim repayment of the mortgage-money before redemption, but in the present case the contract gives no right to claim repayment, but in terms denies it. The only right the mortgagee had was to recover damages for the breach of the contract by the mortgagor, in not delivering possession of the whole of the land to him—*Visvalinga v. Palaniappa*, 21 Mad. 1 (3).

416. Clause (a)—Personal covenant to pay:—A personal covenant to pay the mortgage-debt is the usual incident of a *simple mortgage*. Such a covenant is implied by the very definition of the simple mortgage as given in section 58 (b). See also *Wahidunnissa v. Gobardhan*, 22 All. 453 (461) (F.B.); *Jangi Singh v. Chander*, 30 All. 388; *Abbakke v. Kunhiamma*, 29 Mad. 491; *Bhugwan v. Parmeshwari*, 5 C.L.J. 287; *Sochet v. Hadayatullah*, 13 Lah. 508, A.I.R. 1932 Lah. 630 (632). Such is also the case with an *English mortgage* where according to the definition in sec. 58 (c), the mortgagor "binds himself to repay the mortgage-money" in order to effectively safeguard his right of redemption. But in a *mortgage by conditional sale*, all that the mortgagor says is that if he pays he will recover his property, but if he does not, the sale shall become absolute; but that does not imply a covenant to pay and does not confer on the mortgagee any right to personal relief—*Balkrishna v. Legge*, 22 All. 149 (P.C.); *Nazim v. Mahabir*, 30 I.C. 224. And in a pure *usufructuary mortgage*, the mortgagor does not even make this qualified covenant, but the mortgagee simply agrees to pay himself out of the profits of the property, and to retain possession until the debt is thus wiped out, or agrees to take the usufruct in payment of interest and to retain possession until the mortgagor chooses to pay the principal.

It has been broadly stated in a number of cases that every loan implies a promise to pay, and that an unqualified admission of indebtedness is equivalent to an express covenant and creates a personal obligation and that therefore in every mortgage there is a personal covenant to pay the mortgage-debt, unless the contrary is expressly stated or appears by implication—*Kali Pershad v. Raye Kishori*, 19 W.R. 281; *Musahab Zaman Khan v. Inayetullah*, 14 All. 513; *Miller v. Runganath*, 12 Cal. 389; *Parbati v. Govind*, 4 C.L.J. 246; *Bhugwan v. Parmeshwari*, 5 C.L.J. 287; *Jiwandas v. Janki*, 18 N.L.R. 145, A.I.R. 1922 Nag. 98; *Seth Gopikishen v. Mankuerbai*, 20 N.L.R. 46, A.I.R. 1924 Nag. 97. A personal covenant is presumed in all mortgages of whatever form. The only difference that can arise would be that in certain forms of mortgages (e.g., usufructuary mortgages) the Court might, in the absence of an express covenant, demand a much more clearly implied covenant than it

might require in other cases—*Parashram v. Brij Mohan*, 13 Lah. 259, A.I.R. 1932 Lah. 164, 135 I.C. 33. This view is taken from the English law, under which a personal covenant to repay the money is implied and presumed in law from the very fact of accepting the loan—*Sutton v. Sutton*, 22 Ch. D. 511. But, it is submitted, this is too general a view. It may apply to the case of a *simple mortgage* as well as to an *English mortgage*, where a personal liability is imposed by the very language of clauses (b) and (e) of sec. 58; but to apply the rule to all classes of mortgage would be to make too wide an assertion. Indeed, as pointed out by Dr. Gour, the very language of this clause implies that such liability can only arise “when the mortgagor binds himself to repay the loan” i.e., when there is an *express* contract to that effect made between the mortgagor and the mortgagee. If a personal covenant were the necessary implication of every mortgage, then this clause would have been unnecessary and the provision contained in this clause would have been inserted in sec. 65 which enumerates the mortgagor’s implied contracts. (Gour’s *Law of Transfer*, 4th Ed., Vol. II, p. 1033). So also, in a *mortgage by conditional sale* the mere promise to pay the money within a fixed period does not import a personal liability—*Nazim Hussain v. Mahabir Prosad*, 30 I.C. 224 (Oudh); *Mahomed Haji v. Ramappa*, 25 N.L.R. 187 (F.B.), A.I.R. 1929 Nag. 254 (255), 119 I.C. 684; *Govind v. Jagannath*, 12 N.L.R. 19, 33 I.C. 753. And in a case of *usufructuary mortgage* their Lordships of the Judicial Committee have expressed the opinion that ‘although a loan *prima facie* involves a personal liability, and although such liability is not displaced by the mere fact that security is given for the repayment of the loan, still the nature and terms of such security may *negative any personal liability* on the part of the borrower’; and then their Lordships concluded that ‘having regard to the nature of the deed which was a usufructuary mortgage only, and to its terms, any personal liability on the part of the mortgagor was excluded’—*Ram Narayan v. Adhindra*, 44 Cal. 388 (400, 401) (P. C.). But if in a usufructuary mortgage there is expressly a personal covenant to pay, then the mortgage ceases to be a pure usufructuary mortgage and becomes a combination of a simple and a usufructuary mortgage; and the mortgagee would be entitled to a decree for the money under this clause as well as to a decree for sale under sec. 67—*Kangayya v. Kalimuthu*, 27 Mad. 526 (528). See also Note 409 under sec. 67. The personal covenant should be clear and unconditional in the undertaking to pay; otherwise it cannot entitle the mortgagee to sue for sale of the property—*Damodara v. Chandapur*, 56 Mad. 892, A.I.R. 1933 Mad. 613 (615). If a usufructuary mortgage-bond expressly states that the mortgage is for a *definite term* of years, and that the mortgagee is to retain possession for that period, the bond cannot be treated as a usufructuary mortgage; and a personal covenant to repay the loan is *implied* in such a transaction. Consequently the mortgagee is entitled to sue for the mortgage-money on the implied contract, after the expiry of the term—*Chhathi v. Bindeshwari*, 8 Pat. 16, A.I.R. 1929 Pat. 605 (608), 120 I.C. 32, 11 P.L.T. 68.

Even if the mortgagor be in the first instance under no personal liability, such liability may arise under clause (b) or (c) [now cl. (c) or (d)] of this section—*Ram Narayan v. Adhindra*, 44 Cal. 388 (400) (P.C.). (P.C.).

The personal covenant can be enforced against the mortgagor as well

as against his legal representatives, but not against the transferees from the mortgagor nor against the transferees from the legal representatives of the mortgagor. See the proviso and Note 424 *infra*.

417. Instances of personal covenants:—The question whether a mortgagor binds himself personally to repay the loan or not must depend upon the construction of the mortgage bond in each case and the intention of the parties as evidenced by the circumstances—*Rajagopalachariar v. Thiagaraja*, A.I.R. 1925 Mad. 991, 86 I.C. 481. There is a personal covenant if the deed contains the words “On the expiry of the term I shall pay the said Rs. and redeem the lands”—*Udayana v. Senthivelu*, 19 Mad. 411; or “It is settled that I shall pay the principal amount to you in three instalments within the aforesaid period”—*Ramaya v. Guruva*, 14 Mad. 232; or “the mortgagees shall be competent to recove the amount in any way they like”—*Parashram v. Brij Mohan*, 13 Lah. 259, A.I.R. 1932 Lah. 164, 135 I.C. 33. A usufructuary mortgage-deed ran as follows: “I shall pay you the said mortgage-amount in the *Chittrai Kalavadi* of year 1883 and take back this deed of mortgage. If I fail to pay the mortgage amount in the said *Kalavadi*, then you shall receive the money in the *Chittrai Kalavadi* of whatever year I may pay it, deliver the said lands to my possession and also give back the bond,” *held* that there was a sufficient covenant to pay in the first clause, and that the second clause did not limit the discretion of the mortgagor—*Sivakami v. Gopala*, 17 Mad. 131 (133) (F.B.); *Rangappa v. Thammayappa*, 26 M.L.J. 514, 24 I.C. 372 (*per* Seshagiri Iyer J.). But where a usufructuary mortgage contained the clause: “Having paid the principal money in the month of Chait 1297 we shall take back the bond and the land,” *held* that these words did not imply a personal covenant to pay the money. It was merely a provision for redemption—*Luchmeshar v. Dookh Mochan*, 24 Cal. 677 (679); *Damodara v. Chandapur*, 56 Mad. 892, A.I.R. 1933 Mad. 613 (615). Where the mortgagor first covenants to transfer the hypothecated properties indefeasibly to the mortgagees (under an English mortgage) and this is followed by the redemption clause, and then the mortgagor further covenants to pay the mortgagee at a certain date the mortgage-debt or any portion thereof then remaining due, with interest, it is manifest that this covenant is added with the intention of making the mortgagor *personally liable* to pay the mortgage-money due to the mortgagee even though the property has been conveyed to him. In such a case the mortgagee is entitled to a personal decree—*Askaran v. Gobardhan*, 26 C.W.N. 318, A.I.R. 1922 Cal. 52 (53), 70 I.C. 158. But where under a mortgage the mortgagor agrees to pay the mortgage-money within a fixed period, and provides that in default of payment within that period the mortgagee would be entitled to foreclose, *held* that the agreement for payment cannot be construed into a personal covenant on the part of the mortgagor, and the remedy of the mortgagee is by foreclosure—*Harlal v. Sheik Rahim*, 70 I.C. 224, A.I.R. 1924 Nag. 53. Where it was provided in a deed of usufructuary mortgage that in case of default in the payment of the mortgage-money on the due date, the mortgagee should continue in possession and enjoyment of the mortgaged property till realisation of the mortgage-money, *held* that there was nothing in the deed in the nature of a personal covenant—*Damodara v. Chandapur*, 56 Mad. 892, A.I.R. 1933 Mad 613 (616).

Where a promise to pay is made contingent on the happening of a

certain event, the promise does not amount to a personal covenant until that contingency happens. Thus, where the mortgagor stipulated that in the event of the mortgaged property being sold for arrears of revenue or other causes the mortgagee might then recover the advance by execution against the mortgagor's person or other property, *held* that the stipulation no doubt contained a covenant to pay, but it was contingent on the sale of the property for arrears of revenue. If this contingency did not happen, no personal decree could be obtained—*Bunseedhur v. Sujaat Ali*, 16 Cal. 540.

418. Invalid mortgages:—Where a simple mortgage is invalid for non-registration, it will be ineffectual as a mortgage but will take effect as a *personal covenant* to pay, and will enable the mortgagee to get a simple money-decree against the mortgagor. See Note 349 to sec. 59 under heading “Effect of non-registration.”

So also, where a mortgage is invalid for want of attestation, it will still be admissible as evidence of personal covenant to repay the loan, and a simple money-decree can be passed on such covenant—*Mahadeo Prosad v. Gajraj Singh*, 3 O.L.J. 164, 34 I.C. 397; *Mathura Prosad v. Cheddi Lal*, 13 A.L.J. 553, 29 I.C. 363. If a mortgagee is induced by the fraud of the mortgagor to enter into a mortgage-transaction, the mortgage is invalid, but the mortgagee will be entitled to recover the money, by virtue of the personal covenant contained in the mortgage. See *Shahzad v. Narain*, 25 A.L.J. 37, A.I.R. 1927 All. 190 (191).

Where a mortgage is void in its entirety, the personal covenant contained in the mortgage is also void. Thus, a usufructuary mortgage of an occupancy holding is void, under the provisions of the Agra Tenancy Act; and a mortgagee cannot sue for a money-decree on the basis of a personal covenant to pay contained in such mortgage—*Har Prasad v. Sheo Gobind*, 44 All. 486, A.I.R. 1922 All. 134, 67 I.C. 792; *Kanhai v. Tilak*, 16 I.C. 42 (All.).

419. Clause (b)—Alternative security:—This clause provides for accidents such as flood, fire, diluvion or other *vis major* destroying the property wholly or partially, without any fault on the part of the mortgagor or mortgagee. A creditor in whose hands a pledge has perished by accident and without negligence on his part is entitled to proceed against his debtor personally for recovery of the debt—*Vithoba v. Chotalal*, 7 B.H.C.R. A.C., 116. Thus, the mortgagee would be entitled to call for his money if he were deprived of the possession of the property by diluvion—*Ram Sewak v. Sheo Naik*, 45 All. 388 (390), A.I.R. 1923 All. 433; *Bhawani v. Jang Bahadur*, 7 A.L.J. 391, 6 I.C. 569; or by accidental fire—*Venkateswara v. Kesava*, 2 Mad. 187. Where the mortgaged property was sold under the Land Acquisition Act, it was held in some cases that the property was to be deemed as ‘destroyed’ within the meaning of this section, and the mortgagee was entitled to the remedy under this clause—*Sajjada Begam v. Janki Bibi*, 20 O.C. 256, 42 I.C. 793; *Prokash Chandra v. Hasan Banu*, 42 Cal. 1146 (1152). But it was pointed out in some other cases that the operation of this clause was limited to destruction of the property through natural or accidental causes, and therefore the sale of the mortgaged property under the Land Acquisition Act was not a “destruction” of the security so as to enable the mortgagee to bring a suit for the mortgage-money against the mortgagor personally—*Arumugam v. Sivagnana*, 13 Mad. 321; but that the mortgagee was

entitled to a lien on the compensation money, for this money was the new form which his original security had taken, and he was therefore entitled to proceed against it—*Byjnath v. Ramodeen*, 21 W.R. 223; *Jotoni Chowdhurani v. Amarkrishna*, 13 C.W.N. 350, 1 I.C. 164; *Debendra v. Mirza Abdul*, 10 C.L.J. 150, 1 I.C. 264 (278); *Venkatarama v. Esumsa Rowthen*, 33 Mad. 429, 20 M.L.J. 313, 5 I.C. 92 (95). This subject has now been specifically provided for in the new sub-section (2) of sec. 73, and the decisions in 20 O.C. 256 and 42 Cal. 1146 are no longer correct.

This clause would not apply if the property is destroyed owing to the negligence of the mortgagee, or if he is under an obligation to restore it in case of such destruction, for his statutory right would then merge in the contractual obligation to repair or restore the property—*Venkateswara v. Kesava*, 2 Mad. 187.

Under this clause, the mortgagee must, prior to suit, call upon the mortgagor to furnish other security. He cannot, without demanding an additional security, sue at once for the mortgage-money—*Kuppier v. Peria Karuppa*, 42 Mad. 578, 36 M.L.J. 286.

420. Clause (c)—Wrongful act or default of the mortgagor:—

This clause as well as clause (d) provides for relief, where the mortgagee is deprived of his security otherwise than by his own default. Where, therefore, the property mortgaged is lost owing to the default of the mortgagee himself, he cannot sue for the mortgage-money—*Chitkali v. Mathura*, 3 C.L.J. 220; *Hamadyar Khan v. Shankar*, A.I.R. 1923 Lah. 357, 85 I.C. 802. Thus, where the mortgaged property is sold away for arrears of revenue, owing to the default of the mortgagee in possession, he cannot bring a suit for the mortgage-money—*Kashi Lal v. Nurul Haq*, 8 Pat. 569, A.I.R. 1929 Pat. 209 (210), 121 I.C. 466.

The right of personal recovery conferred by clauses (c) and (d) exists independently of and is not taken away by any personal covenant to repay contained in the mortgage-deed. The mortgagee is entitled to sue the mortgagor whenever he is deprived of his security, in spite of the fact that a suit under a personal covenant contained in the mortgage-deed is barred at that time—*Appasami v. Virappa*, 29 Mad. 362.

*Instances of mortgagor's wrongful act or default:—*If the mortgagor conceals from his mortgagee the fact that the property mortgaged to him is subject to a prior incumbrance, the mortgagee may sue for the return of the money advanced without waiting for the expiry of the stipulated period—*Bhugwan Acharjee v. Govind*, 9 Cal. 234; *Ahmadulla v. Salar Baksh*, 27 All. 488. Where a mortgagor must have known that the property he was mortgaging was non-transferable, while the mortgagee believed that it was transferable, the act of the former was a default within the meaning of this section—*Ganesh v. Sujhari*, 10 All. 47. Where an unregistered mortgage was effected in favour of the mortgagee, and afterwards the property was sold for valuable consideration by a registered deed to one who had no notice of the mortgage, the mortgagee was held to be deprived of his security by the wrongful act of the mortgagor and was entitled to the remedy provided by this section—*Appasami v. Virappa*, 29 Mad. 362. A breach of the duty imposed by section 65 on the mortgagor is a 'default'. Thus, where the mortgagor had previously mortgaged the same property to a third party, sec. 65 would imply a covenant on the part of the mortgagor to pay off the prior mortgage when it became due, and if he fails to do so and thus allows the first mortgagee

to bring the property to sale, the second mortgagee would be entitled under this clause to sue the mortgagor personally for the money advanced by him—*Singjee v. Tiruvengadam*, 13 Mad. 192. The obligation of a mortgagee in possession to pay the revenue does not extend beyond the portion mortgaged to him; therefore, if the mortgagor fails to pay the revenue in respect of a portion not mortgaged, and in consequence the whole mortgaged property is sold, the mortgagee can enforce his claim against the mortgagor personally, having also under sec. 73 a claim on the sale-proceeds—*Sawaba v. Abaji*, 11 Bom. 475; *Jhabbu Ram v. Girdhari*, 6 All. 298. A defect of title of the mortgagor entitles the mortgagee to sue for the mortgage-money; but the defect must be real and not imaginary. Thus, a mortgagee was put in undisturbed possession of the mortgaged property. Subsequently discovering some *alleged* defect of title in respect of the property, he secretly took a mortgage from the supposed owner, and thereafter called the attention of the mortgagor to the defect. No attention having been paid by the mortgagor, the mortgagee brought a suit for recovery of the money. *Held* that upon the facts of the case he was not entitled to do so—*Amirullah v. Rasulbaksh*, 17 A.L.J. 474, 50 I.C. 744. An act of waste committed by the mortgagor makes him liable to be sued for the mortgage-money under this clause—*Ramakrishnama v. Chengu Aiyar*, 27 M.L.J. 494, 33 I.C. 321. Where in a case of usufructuary mortgage, the mortgagor by his own wrongful acts prevented the mortgagee from realising the full rents and profits which would have gone towards satisfaction of the mortgage-money, and realised certain rents himself, *held* that the mortgagee was deprived of a part of his security owing to the wrongful acts of the mortgagor, so as to bring this section into operation—*Ram Narayan v. Adhindra*, 44 Cal. 388 (402) (P.C.).

421. What is not a 'wrongful act or default':—In a usufructuary mortgage, if the mortgagee is put into possession, the mortgagor does not necessarily covenant against its alienation: therefore if the mortgagor sells his equity of redemption and the mortgagee is deprived of the possession of a part of the property in consequence, he cannot sue for the mortgage-money; the sale of the equity of redemption is not a wrongful act under this section—*Jhabbu Ram v. Gidhari*, 6 All. 298; *Gokul v. Shrimal*, 6 Bom.L.R. 288. So also, where a property mortgaged with possession was attached and sold in execution of a decree obtained by a creditor of the mortgagor, but the mortgagee took no steps to set aside the sale, and was dispossessed by the auction-purchaser, the mortgagee was not entitled to maintain a suit for the mortgage-amount under this section. The creditor who held a decree against the mortgagor had a right to bring to sale the equity of redemption of his debtor (the mortgagor), and the mortgagor was at liberty to allow such equity to be conveyed by the Court sale for his debt. The mortgagor, by so allowing his equity to be sold away could not be said to have committed a wrongful act or default—*Gopalasami v. Arunachella*, 15 Mad. 304 (305).

422. Clause (d)—Failure to deliver or secure possession to mortgagee:—This clause should be taken as a proviso to sec. 67 (a) which lays down that a usufructuary mortgagee as such is not entitled to sue for foreclosure or sale. Under this clause, if the mortgagor fails to give possession of the property or to secure to him quiet possession thereof, he is entitled to sue the mortgagor for the mortgage-money—

Abdul Iasalam v. Rafiat, 2 C.L.J. 493. Where the mortgage-bond contained an express stipulation that the mortgagee would be entitled to sue for the mortgage-money upon being dispossessed, and the mortgagee was dispossessed by the mortgagor before the due date of payment, *held* that the mortgagee was entitled to sue for the mortgage-money both under the stipulation in the bond and under the provisions of this section—*Afiruddin v. Joy Chandra*, 35 C.W.N. 103 (104). In a Madras Full Bench case it was held that a usufructuary mortgagee, who was not given possession by the mortgagor, ceased to be a usufructuary mortgagee, and was entitled to sue for foreclosure or sale—*Subbamma v. Narayya*, 41 Mad. 259 (263) (F.B.). But this decision is no longer correct in view of the amendment of clause (d) of sec. 58. See Note 342 under that section. But the new clause (d) of sec. 58 would not apply to a mortgage executed before the Amendment Act of 1929, and if such a mortgage-deed contained a personal covenant to repay the mortgage-money in the event of the mortgagor failing to secure the mortgagee in possession of the property, the mortgage was not a purely usufructuary one, and the mortgagee was entitled to sue for sale—*Ram Khilawan v. Ghulam*, 8 Luck. 1190, 141 I.C. 464, A.I.R. 1933 Oudh 35 (36), following 41 Mad. 259 (F.B.).

If it is found that the mortgagee is not in possession, the Court will give him a money-decree, and it is not necessary to find out on what particular date he was dispossessed, or whether he was or was not dispossessed on the particular date alleged in the plaint—*Sadhu Saran v. Barhamdeo*, 8 P.L.T. 355, A.I.R. 1927 Pat. 230, 103 I.C. 592.

But the mortgagee cannot sue for the money unless he is *actually* out of possession. Thus, the mere Court-sale of the property in execution of a decree against the mortgagor cannot give the mortgagee a right to sue (assuming such right to exist) unless the purchaser dispossessed him—*Janki v. Sheomangal*, 1881 A.W.N. 59. So also, the mortgagee cannot sue for the money where the dispossession is due to his *own* default. Thus, an usufructuary mortgagee who fails to make a defence to a suit by a subsequent mortgagee which would have preserved the security, is not entitled to sue for the mortgage-money—*Dunia Lal v. Nowratan*, 2 P.L.J. 490, 41 I.C. 806; *Chitkali v. Mathura*, 3 C.L.J. 220.

The remedy provided in this clause is an *alternative* remedy and does not debar the mortgagee from bringing a *suit for possession*—*Sankata v. Jagat Narain*, 2 O.C. 24. That is, the mortgagee may either avail himself of the remedy here provided and proceed to recover his money, or he may at his option sue the mortgagor for recovery of possession of the property—*Linga Reddi v. Shama Rao*, 17 Mad. 469 (471); *Thakur Chowdhury v. Manup Mahton*, 16 I.C. 735 (Cal.). The Allahabad High Court recently holds that if the mortgagor fails to give possession of a portion of the mortgaged property, the remedy of the mortgagee is to sue for possession and mesne profits—*Gauri Singh v. Bechu Singh*, 1932 A.L.J. 1092, A.I.R. 1933 All. 97 (98), 142 I.C. 779.

Claim to interest by usufructuary mortgagee:—If a usufructuary mortgagee, who under the terms of the mortgage-deed is entitled to receive the interest of the money advanced by him out of the profits of the property mortgaged, has not succeeded in obtaining possession of either the whole or a portion of it, he cannot claim interest on his money at the time of redemption unless the claim for interest is provided for in the deed—

Dubri v. Ram Naresh, 3 O.W.N. 176, A.I.R. 1926 Oudh 224, 93 I.C. 297; *Bhawani Prasad v. Saheb Din*, 9 O.C. 144; *Mahadeo v. Sitla Baksh*, A.I.R. 1922 Oudh 102, 65 I.C. 408; *Mahadaji v. Joti*, 17 Bom. 425. (But see *Sitanath v. Thakurdas*, 46 Cal. 448, 453 where under such circumstances, the mortgagee was held to be entitled to interest). So also, if a mortgagee does not succeed in getting possession over the entire property mortgaged, owing to failure of the mortgagor to deliver possession of a portion of the property, the mortgagee cannot claim interest in lieu of the rents and profits of the property. If the mortgagee does not bring the necessary suit in time requiring the mortgagor to give him additional security by way of compensation, and thereby to re-imbuse himself to the full extent of his loss, he would be deemed in law to have acquiesced in the diminished security—*Dubri v. Ram Naresh*, (supra); *Sheo Shankar v. Raj Jas*, 2 Luck. 676, 4 O.W.N. 744, A.I.R. 1927 Oudh 594 (595), 105 I.C. 164, following *Partab v. Gajadhar*, 24 All. 521 (P.C.); *Prasanna v. Girish*, 37 C.W.N. 1162.

Instances of failure to deliver or secure possession:—The inclusion in the mortgage-deed of plots not belonging to the mortgagor, and his consequent failure to give possession of those plots to the mortgagee, comes under this clause and entitles the mortgagee to sue for his money—*Fateh Din v. Kishen Lal*, 73 I.C. 902, A.I.R. 1923 All. 584. Where a mortgage-deed provided that on default of payment of interest, the mortgagee would be given possession, then the failure of the mortgagor to give possession, on the interest falling into arrears, would entitle the mortgagee to sue for the amount due—*Saravana v. Chinnammal*, 15 Mad. 65. This clause is wide enough to include every instance of failure by a mortgagor to secure a mortgagee in undisturbed possession, at any time during the period for which the mortgagee was entitled to remain in possession. The subsequent dispossession of the mortgagee after possession has been once delivered to him is a failure on the part of the mortgagor to secure him in undisturbed possession—*Hiralal v. Ghasita*, 16 All. 318 (F.B.); *Jainandan v. Baijnath*, 2 P.L.T. 229, 63 I.C. 297 (300); *Pargan Panday v. Mahatam*, 6 C.L.J. 143. Where the mortgagee granted a lease for a fixed term to his mortgagor and it was stipulated in the lease-deed that on the expiration of the said term the mortgagor might on fulfilment of certain conditions mentioned in the deed renew the lease, but the mortgagor, however, on the expiry of the term failed to fulfil such conditions and also refused to give up possession, the mortgagee was held entitled to a money-decree for the amount due under the mortgage—*Hiralal v. Ghasita*, 16 All. 318. Where, after a usufructuary mortgage was executed and the mortgagee took possession, he came to know of a decree on a prior unregistered mortgage under which the property was sought to be sold, the existence of which had been fraudulently suppressed by the mortgagor, held that this failure of the mortgagor to secure undisturbed possession to the mortgagee was enough to sustain a suit for the mortgage-money by the usufructuary mortgagee. The fact that the latter himself bought the property in execution did not affect his right—*Ahmadullah v. Salar Baksh*, 27 All. 488 (491). A usufructuary mortgagee can sue for the mortgage-money on dispossession by a co-sharer of the mortgagor who obtained the mortgaged property on partition—*Tilak Singh v. Jalai Singh*, 11 C.L.J. 136, 5 I.C. 130. The mortgagee has a cause of action under this clause when the mortgagor, on being called

upon to give additional or substituted security, entered into occupation and deprived the mortgagee of the possession—*Pargan Panday v. Mahatam Mahto*, 6 C.L.J. 143. Where the mortgagee is dispossessed by a stranger claiming adversely to the mortgagor, who fails to defend his title and restore the mortgagee to possession, the latter is entitled to recover the mortgage-money—*Maung Po v. Maung Kyauk*, 2 Bur.L.J. 47, A.I.R. 1924 Rang. 143, 79 I.C. 815.

423. **Disturbance of possession:**—*By the mortgagor:*—The mortgagee is entitled to sue for the mortgage-money if he is disturbed in his possession by the mortgagor; and the effect is the same if the disturbance is caused by a person with whom the mortgagor is in collusion—*Nakchedi v. Ram Charitar*, 19 All. 191 (193).

By person claiming superior title:—The provisions of this clause apply to the case of dispossession of the mortgagee by a person holding a *better title* than the mortgagor, and so where a mortgagee is thus dispossessed and deprived of his mortgage security, he is entitled to recover the mortgage-money personally from the mortgagor—*Ram Surat v. Gur Prasad*, 43 All. 484, 19 A.L.J. 357, 63 I.C. 998. This is now made clear by the italicised words added to this clause. The *Special Committee* remarks:—

“Clause (c) of the (old) section provided that the mortgagor is personally liable when he fails to deliver or to secure to the mortgagee the possession of the property without disturbance by him or ‘any other person’. The words ‘any other person’ are very wide and might include a trespasser. The disturbance of the mortgagee’s possession by a trespasser or by a third person with whom the mortgagor was not in collusion should not confer upon the mortgagee a right to sue the mortgagor for the mortgage-money. The words ‘or any other person’ have been held to mean a person claiming under a title superior to that of the mortgagor (I.L.R. 15 Mad. 304; 19 All. 191; 42 Mad. 578). In clause (d) above we propose to substitute for the words ‘any other person’ the words ‘any person claiming under a title superior to that of the mortgagor’.”

By other persons:—This clause applies when the disturbance of the mortgagee’s possession is caused by a person having some title. Covenants for quiet enjoyment must be understood as applying merely to the acts of those claiming by *title*. The Legislature did not intend to make the mortgagor liable for the wrongful acts of *third parties*—*Gopalasami v. Arunachella*, 15 Mad. 304 (306); *Nakchedi v. Ram Charitar*, 19 All. 191 (193); *Jhabbu v. Girdhari*, 6 All. 298 (302).

Thus, if the tenants of the mortgaged property who had to pay rent to the mortgagee wrongfully refused to do so, and if any one of them with whom the mortgagor was not in collusion disturbed the possession of the mortgagee, the mortgagor could not be made liable for the acts of such third persons—*Nakchedi Ram v. Ram Charitar*, 19 All. 191 (193). The English law is thus stated by Lord Ellenborough: “Where a man covenants to indemnify against all persons, this is but a covenant to indemnify against *lawful title*; . . . but it would be an extravagant extension of such a covenant if it were good against all the acts which the folly or malice of strangers might suggest; and therefore the law has properly restrained it within its reasonable import, that is, to *lawful title*,” cited by Gour, *Law of Transfer*, 4th Edn., Vol. II, p. 1048. Therefore where the possession of the mortgagee has been

disturbed by a person claiming without title, the mortgagee is entitled to sue the trespasser for declaration of title and recovery of possession, without suing the mortgagor for the mortgage-money—*Bechu Sahu v. Arjun*, 3 P.L.J. 162, 43 I.C. 917. Where the usufructuary mortgagee is deprived of the mortgaged property by a third party claiming under a purchase from the mortgagor, the mortgagee's right is only to bring a suit against that person to recover the possession of which he has been deprived. He cannot sue the mortgagor for the mortgage-money. The case will not fall under clause (b), for the mortgagor is at perfect liberty to sell his equity of redemption and such sale cannot be called a 'wrongful act' on the part of the mortgagor—*Jhabbu v. Girdhari*, 6 All. 298 (302); *Gokul v. Shrimal*, 6 Bom.L.R. 288. Similarly, if the mortgagee is deprived of the possession of the mortgaged property by reason of a creditor of the mortgagor obtaining a decree against the mortgagor and bringing to sale the mortgagor's equity of redemption in execution of that decree, the mortgagee is not entitled to sue the mortgagor for the mortgage-money—*Gopalasami v. Arunachella*, 15 Mad. 304 (306). But a person claiming adversely to the mortgagor is not a person claiming without title; and therefore if the mortgagee is dispossessed by such a person, the mortgagor is bound to defend the mortgagee's possession. If he fails to do so, he must repay the mortgage-money—*Maung Po Kin v. Maung Kyauk Ye*, 2 Bur.L.J. 47, A.I.R. 1924 Rang. 143, 79 I.C. 815.

424. Proviso—Suit against mortgagor's transferees and legal representatives:—The words "the mortgagor" have been omitted from sub-section (1), and the proviso has been added, to make it clear that in case of clause (a) the liability of the mortgagor to be sued for the mortgage-money can be enforced only against the mortgagor (or against his legal representative) but not against a transferee from the mortgagor nor against a transferee from the legal representative of the mortgagor; whereas under the other clauses the suit for recovery of the money may or may not be brought against the transferees according to the circumstances of each particular case.

"As under section 59A, unless otherwise provided, the term 'mortgagor' will include persons claiming title from him, we have added a proviso to make it clear that such persons are not included in that term as used in clause (a) of sub-section (1) of section 68"—*Report of the Select Committee* (1929).

"Section 68, as it stands at present [*i.e.*, before amendment] deals not only with the cases in which a mortgagee is entitled to sue for the mortgage-money; it also indicates to some extent the persons against whom the suit may be maintained. The opening words of the section are 'The mortgagee has a right to sue the mortgagor for the mortgage-money.' We propose to omit the words 'the mortgagor.' The reason is that the use of these words has given rise to a doubt as to whether the words 'the mortgagor' refer to the mortgagor personally or whether they include his legal representatives or transferees (*See* 27 Mad.L.J. 494 and 34 All. 63). As to clause (a), being the case where the mortgagor binds himself to repay the sum, no question can arise as to the liabilities of the legal representatives of the mortgagor or his transferees; the word 'himself' in that clause clearly indicates that none but the mortgagor can be sued for the mortgage-money in that case. As regards clauses (b), (c)

and (d), the legal representative of the mortgagor or his transferee may be liable to be sued personally in some cases, while not in others. It would make the section very cumbrous if we attempted to lay down the different circumstances under which the personal liabilities of legal representatives and transferees arose and the extent of their liability. We have, therefore, considered it desirable to leave these matters alone, as we think that the question in each case should be decided by the general law.”—*Report of the Special Committee* (1927).

It should be noted that the proviso has been added on the recommendation of the *Select Committee*, while the *Special Committee* only omitted the words “the mortgagor.” It should further be noticed that the amendment made by the *Select Committee* has somewhat deviated from the intention of the *Special Committee* as evidenced by their Report cited above. For, the *Special Committee* recommended that the liability under clause (a) should attach only to the mortgagor, that “*none but the mortgagor* can be sued for the mortgage-money in that case,” and that “no question can arise as to the liabilities of the *legal representatives of the mortgagor* or his transferees”; but the proviso added by the *Select Committee* laid down that clause (a) excluded only the transferees from the mortgagor and the transferees from the legal representatives of the mortgagor; and this seems to imply that the *legal representatives of the mortgagor* are not excluded by the proviso but that they are equally bound with the mortgagor by the covenant referred to in clause (a).

Leaving clause (a) out of consideration, the general rule is that the liability of the mortgagor to be sued for the mortgage-money under the circumstances mentioned in this section attaches to the mortgagor's representatives also. A provision in a statute which gives a right or imposes a liability on a person must be deemed to confer that right and impose that liability on the person's legal representatives also, and if it confers that right or imposes the liability on that person as the owner of a certain property, such right or liability is conferred or imposed on the assignee of the property as well. Therefore clause (c) of this section which makes the mortgagor liable to a personal action in case the mortgagee is deprived of the security for any wrongful act or default (e.g., waste) committed by the mortgagor, applies also to the heir of the mortgagor; and such heir is liable to pay the mortgage-money under clause (c) when he commits waste to the prejudice of the security—*Ramkrishna v. Chengu Aiyar*, 27 M.L.J. 494, 33 I.C. 321.

425. Sub-section (2):—The *Special Committee* remarks:—

“The personal remedy declared by the section is additional and it has been held that it can be pursued by the mortgagee concurrently with his other remedies or even before he proceeds against the mortgaged property or security (17 Mad. 469). Although *prima facie* a mortgage involves the idea of a loan (I.L.R. 44 Cal. 388, at p. 400), it is essentially a security. In actual practice this concurrent remedy has led to considerable abuse. The mortgagee, with a view to get an increase of interest or other undue advantage by the threat of arrest and imprisonment, may obtain a money decree without proceeding against the property. We, therefore, propose that in the cases mentioned in clause (a) and clause (b) the mortgagee should exhaust all his available remedies against the mortgaged property before he seeks to pursue the personal remedy against the mortgagor. In cases falling under clauses (c) and (d) above, such

a restriction on the rights of a mortgagee is not called for. The proposed provision will not be inconsistent with Order XXXIV, rule 6, of the Civil Procedure Code, under which, in a mortgage suit, the mortgagee is not entitled to execute the decree personally against the mortgagor till the mortgaged property has been sold and the sale proceeds are found insufficient to pay off the entire mortgage-debt.

"We also consider that it should be open to a mortgagee to abandon or relinquish the security, if he chooses to do so, in cases falling under clause (a) and clause (b) above, if he is anxious to pursue the personal remedy. The mortgagee should not, however, be allowed to relinquish a portion only of the security so as to increase the burden on the remaining portion (I.L.R. 50 Cal. 718).

"In the case mentioned in clause (a) above, the cause of action to sue for a personal decree will arise on the date fixed for repayment. In other cases the cause of action is accelerated and the mortgagee need not wait till the due date has arrived (I.L.R. 25 Cal. 450; 15 Mad. 174; 16 All. 318; 26 Bom. 241). The period of limitation for the enforcement of the personal remedy, if the document be registered, is six years (Art. 116 or 120 of the Limitation Act; 12 Cal. 389; 12 I.A. 12, 7 All. 502; 34 All. 246). Much longer periods are provided for remedies against property. A suit for the enforcement of the personal remedy may, therefore, have to be instituted earlier than the mortgage suit. In order that such a suit may not be barred by limitation, or struck off for non-prosecution, we propose to provide that it should be stayed till the mortgagee exhausts his remedies against the mortgaged property.

"The amendment of section 68 does not necessitate the amendment of Order XXXIV, rule 6, Civil Procedure Code. The rule applies to a mortgage suit and has no application to a suit under this section in which the only decree that can be passed is for the payment of money (I.L.R. 29 Mad. 362).

"So also no amendment of rule 14 of Order XXXIV is necessary. In cases where the mortgagee is required to exhaust his remedies against the mortgaged property, the property would be sold before he is allowed to exercise his right for a personal decree against the mortgagor and the provisions of rule 14 will not come into operation. That rule can only apply to other cases where he is not required to proceed against the mortgaged property first.

"In cases in which the mortgage-money is agreed to be paid by instalments or the interest is to be periodically paid, it has been held that a sufficient portion of the mortgaged property may be brought to sale for the amount due. These cases are governed by the express terms of the mortgage deed (I.L.R. 35 Bom. 327; 42 Mad. 813), and are not affected by section 68"—*Report of the Special Committee.*

"*At its discretion*":—"Instead of making it *obligatory* on a Court to stay a suit or proceeding brought for the enforcement of the personal remedy until the mortgagee has exhausted his remedies against the mortgaged property, we have in sub-section (2), preferred to leave it to the *discretion* of the Court to stay that suit or proceeding."---*Report of the Select Committee.*

"*And, if necessary, re-transfers the mortgaged property*":—"We have also made it clear that the mortgagee abandoning the security is

bound to retransfer the mortgaged property to the mortgagor, if required to do so.”—*Report of the Select Committee.*

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property or any part thereof, without the intervention of the Court, is valid in the following cases, and in no others, (namely)—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan, or Buddhist, or a member of any other race, sect, tribe, or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor General in Council, in the local official Gazette;

(b) where the mortgagee is the Secretary of State for India in Council;

(c) where the mortgaged property or any part thereof is situate within the town of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab or in any other town which the Governor-

69. (1) *Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866, a mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely:—*

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan, or Buddhist, or a member of any other race, sect, tribe, or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor-General in Council, in the local official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgagee is the Secretary of State for India in Council;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgaged property or any part thereof was, on the date of the execu-

General in Council may, by notification in the *Gazette of India*, specify in this behalf.

tion of the mortgage-deed, situate within the town of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab or in any other town or area which the Governor-General in Council, may, by notification in the Gazette of India, specify in this behalf.

(2) No such power shall be exercised unless and until—

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage, amounting at least to five hundred rupees, is in arrear, and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power, shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee arising from the sale after discharge of prior incumbrances (if any) to which the sale is not made subject, or after payment into Court, under section 57, of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale; and secondly. in discharge of the mortgage-money and costs and other money (if any) due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

(5) *Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.*

The powers and provisions contained in sections 6 to 19 (both inclusive) of the 'Trustees' and Mortgagees' Powers Act, 1866 shall be deemed to apply to English mortgages wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan, or Buddhist, or a member of any other race, sect, tribe, or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor-General in Council, in the local official Gazette.

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* * *

Amendment:—This section has been amended by sec. 34 of the T. P. Amendment Act (XX of 1929) for the following reasons:—

'Clause (a) and the last paragraph of section 69 refer to English mortgages. Clause (a), however, relates to an English mortgage which contains an express power of sale, while the last paragraph deals with one which does not contain any such power. In the case of English mortgages dealt with in clause (a) the power of sale is to be exercised in accordance with the procedure prescribed in paragraphs 2 and 4 of the section, whereas in the case of those in the last paragraph the rules contained in sections 6 to 11 of the 'Trustees' and Mortgagees' Powers Act (XXVIII of 1866) apply. The procedure laid down in section 69 differs from that prescribed in Act XXVIII of 1866 in several particulars. Act XXVIII of 1866 was based on Lord Cranworth's Act (23 & 24 Vict., c. 145) which was repealed by the Conveyancing Act, 1881 (44 & 45 Vict., c. 41). Sections 19 to 22 of the latter statute relate to the exercise of the power of sale by a mortgagee and are now reproduced in sections 101 to 108 of the Property Act, 1925 (15 & 16 Geo. V, c. 20). The provisions of Lord Cranworth's Act were, as pointed out by Fisher on Mortgage (paragraph 975, 6th Edn.), open to the following defects:—

'If...the interest on the mortgage be payable half yearly, it seems that the repealed statutory power cannot be exercised till at least eighteen months have expired from the date of the security. The interest must have been in arrear for six months, and six months' notice must have been given; and in the absence of a provision that the notice may be given before the interest has actually fallen into arrear for six months, an exercise of the power depending upon such a notice could hardly be considered safe.

Again, the purchaser's title is protected only where no case has arisen to authorize the exercise of the power, and where no

notice has been given. The Act is silent as to an improper exercise of the power after it has arisen, and which is irregular otherwise than by the absence of notice; nor does it protect the purchaser where he is aware of the absence of notice, or of other irregularities; and it gives the person damnified an express redress in damages only where the exercise of the power was unauthorised: but none where, being authorised, it was improperly exercised either for want of notice or otherwise.'

"These defects are also present in the Indian Act (*cf.* sections 6 to 9 of Act XXVIII of 1866). In England they were removed by sections 19 to 21 of the Conveyancing Act, 1881, corresponding to sections 101 to 108 of the English Property Act, 1925. Paragraphs 2 to 4 of section 69 are also based on those sections of the Conveyancing Act, 1881. We think that the antiquated and manifestly defective procedure in Act XXVIII of 1866, based on an English statute which has long been repealed, should be revised.

"In our opinion, English mortgages, whether they contain an express power of sale or not, should all be governed by the provisions of paragraphs 2 to 4 of section 69 which are based on the existing provisions of the English law. We, therefore, propose that section 69, along with clause (a), should be recast and the provisions relating to the appointment of a receiver, referred to in the last paragraph of the section, should be the subject of a separate section (69A).

"As the 'Trustees' and Mortgagees' Powers Act, 1866, deals with other matters, such as trusts and leases, besides mortgages, it should not be repealed. In order, however, to make it clear that the Act will no longer apply to mortgages, we propose that the words 'notwithstanding anything contained in the 'Trustees' and Mortgagees' Powers Act, 1866,' should be inserted at the beginning of section 69."—*Report of the Special Committee.*

425A. Application:—This Act does not apply to the Punjab, and therefore in that province there is nothing to prevent the parties from making a stipulation in a mortgage deed allowing sale without the intervention of Court, and such stipulation is unfettered by the restrictions of this section—*Kanhaiya Lal v. National Bank of India Ltd.*, 4 Lah. 284 (P.C.), 75 I.C. 7, A.I.R. 1923 P.C. 114.

"*Town of Bombay*":—Property situate at Mahim within the island of Bombay, and within the local limits of the Bombay High Court's original civil jurisdiction falls under this section—*Trimbuk v. Bhagwandas*, 23 Bom. 348.

426. Object and scope of section:—This section has been enacted to set at rest the conflict of decisions which existed prior to the passing of this Act regarding the mortgagee's power to sell the mortgaged property without the intervention of the Court. In England such a power is the incident of all mortgages, unless it is excluded or limited by the mortgage-deed, and it was the custom of the English people resident in this country to insert in their mortgage-deeds a power of sale authorising the mortgagee, subject to certain conditions, to sell the mortgaged property without the intervention of the Court, if the money was not paid within the stipulated period. But it was felt that a power of this kind, if extended to the mofussil mortgages, might work mischievously, especially in rural India (see Mr. Crosthwaite's remarks on the passing of the Act, in *Gazette of*

India, 1882, Feb. 7, Extra Supplement). In a Bombay case, Melville J. observed: "I am strongly disposed to agree with the Calcutta Judges as to the impolicy of allowing sales by mortgagees in the mofussil. The mass of mortgages consists of mortgages of ancestral fields, made by cultivators to greedy and unscrupulous money-lenders. The great object of the money-lender is to get the land into his own hands, and when he has succeeded, he is the worst possible landlord, spending nothing on the improvement of his estate, and rack-renting the unfortunate ryot whose proprietary rights have passed from him, but who is willing to slave for the usurer rather than abandon the fields of his fathers. When we stand between two classes such as these, it is the borrower and not the lender whom we should protect"—*Keshavrao v. Bhavanji*, 8 B.H.C.R. (A.C.) 142. This section will now act as a salutary check against such abuses by strictly forbidding the power of sale in mortgages executed in the mofussil. See clause (c) of sub-section (1).

427. Power of sale:—The power of sale contemplated by this section is a power to sell privately, *i.e.*, without the intervention of the Court; whereas the power conferred by sec. 58 (b) in a simple mortgage is a power to 'cause the mortgaged property to be sold' *i.e.*, to have the property sold through the intervention of the Court—*Kishanlal v. Gangaram*, 13 All. 28. A simple mortgagee cannot sell the mortgaged property privately, unless the mortgage-deed *expressly empowers him* to do so, and even he can sell only under the circumstances enumerated in clause (b) or (c) of this section. So is the case with usufructuary, conditional, equitable and anomalous mortgages. In an English mortgage, the power need not be expressly conferred, but it cannot be exercised unless the parties are Europeans.

In a simple mortgage, the power of sale must be actually conferred by the mortgage-deed. A mere provision that the mortgagee "shall have all the rights conferred upon a mortgagee by the Transfer of Property Act" is not sufficient to confer such a power, and a private sale by the mortgagee is invalid and gives no title to the purchaser—*Mataprasad v. Kunnon*, 6 Rang. 134, A.I.R. 1928 Rang. 128, 110 I.C. 698.

When power can be exercised:—The power of sale can be exercised when there has been a "default of payment of the mortgage-money." Where the amount due for principal is not repayable at any particular date nor is anything stated as to when it is to be repaid, then until there is a demand made for the money, there can be no default in payment of the principal sum due—*Purasawalkam H. J. S. Ltd. v. Kuddas*, 23 L.W. 476, A.I.R. 1926 Mad. 841, 94 I.C. 860.

Power on assignment:—The power of sale passes with the assignment of the mortgage, so that it can be exercised by the assignee. If the mortgagee sub-mortgages his interest, transferring his power of sale, the sub-mortgagee can exercise that power—*Ram Krishna v. Official Assignee*, 45 Mad. 774, A.I.R. 1922 Mad. 390, 69 I.C. 407. In fact, in such a case the proper person to exercise the power is the sub-mortgagee and not the original mortgagee—*Stevens v. Theatres Ltd.*, [1903] 1 Ch. 857. Similarly, if the mortgagor transfers his interest, the power may be exercised against the transferee—*Exchange and Hop Warehouse Ltd. v. Association of Land Financiers*, 34 Ch. D. 195.

428. Notice:—Clause (a) of sub-section (2) providing for service

of notice is taken almost word for word from sec. 20 (i) of the English Conveyancing Act, 1881 (44 & 45 Vict. C. 41).

This clause lays down that the mortgagee must give three months' notice before sale, and this period of three months cannot be curtailed by an agreement in the decree. Therefore, if a deed of mortgage provides that the power of sale may be exercised after 15 days' notice, the condition as to notice is invalid—*Madras Deposit and Benefit Society v. Passanha*, 11 Mad. 201. But it has been held at the same time in the same case that if the property is sold before the expiry of three months from the notice, the sale is not necessarily invalid, but it only affords a ground for damages to the person damnified by the sale—*Ibid.* So also, a sale is not invalid even if due notice was not given; see sub-section (3).

It is not necessary that the sale should take place immediately after the expiry of three months after notice, nor does the fact that a sale is not made immediately on the expiry of the term of notice make the giving of fresh notice necessary. The mere fact of a long delay having taken place between the maturity of the notice and the actual sale does not make a fresh notice necessary even when the delay is nearly two, three or four years—*Major v. Ward*, 5 Hare 598; *Muncherji v. Noor Mahomedbhoy*, 17 Bom. 711; *Metters v. Brown*, 33 L.J. Ch. 97.

Where the mortgagor has assigned his interest of which the mortgagee is aware, the notice must be served on the assignee; but if the assignment has taken place after a notice has already been served on the mortgagor, no fresh notice on the assignee is necessary—*Muncherji v. Noor Mahomedbhoy*, *supra*.

429. Sale for arrears of interest:—Clause (b) of sub-section (2) gives a power of sale where the interest has amounted to at least Rs. 500, and has remained unpaid for 3 months after it became due. Under this clause, the power of sale can be exercised even if there is no default of payment of principal money—*Firm of A. C. Kundu v. Rookanand*, 11 Bur. L.T. 147, 43 I.C. 921. But if there is a covenant in the mortgage deed that the power of sale is not to be exercised unless default is made in the payment of the *principal* sum or any part thereof on the day appointed for payment, then of course the power cannot be exercised unless there has been a default in the payment of the principal, and the fact that interest has accumulated to Rs. 13,000 and has remained unpaid for 3 months after becoming due will not entitle the mortgagee to sell the property—*Jerup Teza & Co. v. Peerbhoy*, 23 Bom.L.R. 1241, 64 I.C. 634, A.I.R. 1921 Bom. 421.

430. Conduct of sale:—A mortgagee exercising a power of sale is, in honour and in law, under an obligation to sell the mortgaged property under such conditions as an owner would reasonably use in the sale of his own property—*Chabildas v. Dayal Mowji*, 6 Bom.L.R. 557. A mortgagee having a power of sale, provided he acts *bona fide* and takes reasonable precautions to obtain a proper price, has a perfect right to realise his security by sale in such manner as he thinks most conducive to his own benefit—*Farrar v. Farrars*, 40 Ch. D. 395. But he must not look after his own interests alone, nor should he recklessly sacrifice his mortgagor's property—*Chabildas v. Dayal Mowji*, 5 Bom.L.R. 247; *Kennedy v. De Trafford*, (1896) 1 Ch. 762 (772). The property may be sold privately or by public auction; if it is sold publicly, the mortgagee must give reasonable publicity to the sale; thus, the conditions of the sale at an auction

should not be merely written and read over at the time of sale, but they should be circulated in the auction room and widely distributed among the bidders before the sale—*Chabildas v. Dawal Mowji*, 6 Bom.L.R. 557. He must not impose depreciatory conditions on the sale which are likely to shy off intending purchasers. Thus, if he says that the purchaser must be satisfied with accepting such title as the vendor can give and shall not require the vendor to enter into any other covenant except a covenant that he has not encumbered the property, and shall not raise any question or objection as to title and shall be bound to accept such title as the vendor possesses, *held* that such a condition will have a depreciatory tendency and will fetch a lower price—*Ibid*.

431. Suspension of sale:—When a power of sale has become absolute, the exercise of the power can not be suspended by the filing of a suit for redemption—*Adams v. Scott*, 7 W.R. (Eng.) 213. The mortgagee under an English mortgage cannot be restrained by an injunction from exercising his power of sale, merely because a suit for redemption has been filed against him by the mortgagor—*Jagjivan v. Shridhar*, 2 Bom. 252; the sale though held during the pendency of the redemption suit is not affected by the doctrine of *lis pendens* embodied in sec. 52—*Rama Krishna v. Official Assignee*, 45 Mad. 774, A.I.R. 1922 Mad. 390, 69 I.C. 407. Such a sale *pendente lite* can be stayed only by the mortgagor paying into Court the amount due, or by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner—*Jagjivan v. Shridhar*, 2 Bom. 252. So also, a sale can be stayed where it is proved that the mortgagee is selling the property in contravention of the terms of the mortgage-deed (*e.g.*, where the mortgagee is selling the property on default of payment of *interest* whereas he is empowered in the deed to sell only on default of payment of *principal* on the fixed date); and the sale can be stayed not only at the suit of the mortgagor but also at the suit of a subsequent mortgagee—*Jerup Teja & Co. v. Peerbhoy*, 23 Bom.L.R. 1241, 64 I.C. 634, A.I.R. 1921 Bom. 421.

432. Grounds for impeaching the sale:—A sale held under this section cannot be impeached on the mere ground that no case has arisen to authorise the sale or that due notice was not given or that the power was improperly or irregularly exercised. See sub-section (3). A mortgagee, strictly speaking, is not a trustee for the power of sale. It is a power given for his own benefit to enable him the better to realise the mortgage-debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as to be in itself an evidence of fraud—*Haddington Island Quarry Co. v. Alden Wesley*, (1911) A.C. 722, 13 I.C. 261 (P.C.); *Warner v. Jacob*, 51 L.J. Ch. 642. But if the property is purchased by the mortgagee himself *benami*, the sale is void—*Vallabhdas v. Pranshankar*, 30 Bom.L.R. 1519, A.I.R. 1929 Bom. 24 (26), 113 I.C. 313. Where a mortgagee puts up the mortgaged property to sale, under a power given him by the mortgage-deed, he cannot sell it to himself, either alone or with others, nor to a trustee for himself—Halsbury's *Laws of England*, Vol. 21, p. 257. If a sale is held before the expiry of the three months from the date of notice as provided in clause (a) of sub-section (2), the sale is not liable to be set aside, but the mortgagor's remedy lies only by way of damages—*Madras Deposit and Benefit Society v. Passanha*, 11 Mad. 201. A mort-

gage was executed in favour of M to secure a loan of Rs. 1,500, and it conferred a power of sale on the mortgagee. M transferred the mortgage to D. Afterwards D made a new advance of Rs. 800 to the mortgagor and secured it by an equitable mortgage by deposit of title deeds of the same property. As D could get no repayment of the money after repeated demands, he sub-mortgaged the property to X, who purporting to act in exercise of the power of sale conferred by the original mortgage, sold the property to Y, not only for the original debt of Rs. 1,500 but also the subsequent advance of Rs. 800 (with interest in both cases). *Held* that X could exercise the power of sale only in respect of Rs. 1,500, for which a power of sale was expressly given in the original mortgage, but that the power of sale could not be exercised in respect of the amount of Rs. 800 which the original document did not cover. But the mortgagor is not entitled to have the sale set aside; he can only bring a suit for damages under this para, if he can show that he has been in any way damaged by the improper exercise of the power of sale—*Ramakrishna v. Official Assignee*, 45 Mad. 774, 43 M.L.J. 506, A.I.R. 1922 Mad. 390, 69 I.C. 407. In this case a power of sale was given to the mortgagee, though in respect of part of the money. But where there was *absolutely no power* of sale conferred on the mortgagee, a private sale of the property was absolutely void, and gave no title to the purchaser. This clause is intended to protect the purchaser in the event of an unauthorised exercise of a power of sale, but it does not apply to a case of purported exercise of a non-existent power—*Mataprasad v. Kunnon*, 6 Rang. 134, A.I.R. 1928 Rang. 128, 110 I.C. 698.

Though a sale is not impeachable by the mortgagor on the mere ground that the power was improperly exercised, still this protection does not extend to cases where the purchaser had *notice* of the improper exercise of the power prior to the sale of the property—*Chabildas v. Dayal Mowji*, 6 Bom.L.R. 557; or where the power of sale was exercised in a *fraudulent* or improper manner contrary to the terms of the mortgage—*Jagjivan v. Shridhar*, 2 Bom. 252. Thus, where the sellers (mortgagee's agents) suddenly stopped the sale under such circumstances as naturally to lead bidders to suppose that the sale was over and to go away from the place of auction and the bidders actually went away and the purchaser was present, *held* that the purchaser was affected with the notice of the impropriety of the sale; he therefore bought at his peril, and the sale, not being a *bona fide* one, must be set aside—*Chabildas v. Doyal*, 31 Bom. 566 (P.C.).

433. Appropriation of sale proceeds:—Sub-section (4) which gives directions as to the application of the sale proceeds, is taken from sec. 21 (3) of the English Conveyancing Act, 1881. After applying the sale proceeds to the payment of the costs of the sale, and in liquidation of the mortgage-money, the mortgagee must refund the surplus sale proceeds to the mortgagor. With regard to such money he is in the position of a trustee for the person entitled to it (*Pichu Vadhiar v. Secretary of State*, 40 Mad. 767), and he must pay the money to such person immediately after the sale; otherwise he will be liable to pay interest at 6 per cent. (i.e., Court rate) from the date of sale—*Haji Abdul v. Haji Noor Mahomed*, 16 Bom. 141. Being in the position of a trustee, it is his duty to see that the sale proceeds are paid to the person entitled to them. If he pays it to a wrong person, he does not exonerate himself from the

liability to pay it to the rightful claimant—*Tanner v. Heard*, 23 Beav. 555; *Matheson v. Clark*, 3 Drew. 3; *Charles v. Jones*, 35 Ch. D. 25; *Magnus v. Queensland National Bank*, 37 Ch. D. 466.

69A. (1) *A mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing signed by*

Appointment of
receiver.

him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) *Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.*

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) *A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.*

(4) *The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section.*

(5) *A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.*

(6) *The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all*

costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent. on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent, on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely:—

- (i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;
- (ii) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;
- (iii) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;
- (iv) in payment of the interest falling due under the mortgage;
- (v) in or towards discharge of the principal money, if so directed in writing by the mortgagee;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or import-

ance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.

The costs of every application under this sub-section shall be in the discretion of the Court.

(11) In this section, "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage.

This section has been inserted by sec. 35 of the Transfer of Property Amendment Act (XX of 1929).

"We also consider that in all cases where the mortgagee is entitled to exercise the power of sale under section 69, it is desirable to make provision for the appointment of a receiver. We propose that a new section (section 69A) should be added on the lines of sections 101 (iii) and 109 of the English Property Act, 1925, providing for the appointment of a receiver, the rights and liabilities of such receiver, and the procedure to be followed when such appointment is made. At the same time, we think it desirable that specific provision should be made under section 69A for the following:—

- (a) unless otherwise provided by the terms of the mortgage-deed, the receiver should be appointed by the consent of both the mortgagor and the mortgagee;
- (b) where the parties do not agree regarding the person to be appointed as a receiver, they should have liberty to apply to the Court in a summary proceeding. (Sub-section 2).

"We also think it desirable to make provision in the section on the lines of section 34 of the Indian Trusts Act, 1882, enabling the parties or the receiver to apply in a summary proceeding to the Court for its opinion or advice or for directions in matters connected with the management or administration of the mortgaged property (sub-section 10)."—
Report of the Special Committee.

"In clause (3) of section 69A we have made it clear that the liability of a mortgagor for the acts or defaults of a receiver is removed if such acts or defaults are due to the improper intervention of the mortgagee."—
Report of the Select Committee.

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Accession to mortgaged property.

Illustrations.

(a) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(b) A mortgages a certain plot of building land to B, and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

434. Principle:—This section is converse to sec. 63.

The principle of this section is in accordance with the following observations of the Privy Council: "Most acquisitions by the mortgagor enure for the benefit of the mortgagee, increasing thereby the value of the security, and similarly, any acquisitions by the mortgagee are accretions to the mortgaged property or substitutions for it, and therefore subject to redemption"—*Kishen Dut v. Mumtaz*, 5 Cal. 198 (210) (P.C.). Where an accession to the mortgaged property takes place, it becomes incorporated in the original security as though it has been in existence at the time when the original subject of the security was given, just as young trees growing upon land, which is subject to a mortgage, when they grow into timber, create a valuable accession to the land and therefore to the security, but cannot be regarded in any sense as separate or independent from the land upon which they stand—*Krishna Gopal v. Miller*, 29 Cal. 803.

Scope:—This section regulates the rights of the mortgagor and the mortgagee *inter se*, and of course applies to their representatives, but not to independent third parties, who are perfect strangers. Third parties who have nothing to do with the security and between whom and the mortgagor and the mortgagee there is no privity of contract, are not affected by the provisions of this section. If a stranger, under a *bona fide* but mistaken belief that he has an absolute title to a land, which belongs to somebody else, puts up a building upon it, without any knowledge that the land is mortgaged to another person, the building would not become a part of the security under that mortgage. The mortgagee cannot claim the building against this stranger third party; but the latter will be entitled to remove the materials—*Nannu Mal v. Ram Chander*, *infra*.

But an auction-purchaser at a sale held in execution of a decree passed on the foot of a prior mortgage, to which the second mortgagee was no party, acquires all the right title and interest of the mortgagor, and must be treated as a *representative* of the mortgagor; consequently this section would apply to him, and if he erects a building on the land, he will not be entitled to remove the materials, but the building will be liable to be sold as an accession to the second mortgage. The fact that he had no *notice* of the second mortgage is immaterial, for as he is treated as a representative of the mortgagor, he must be deemed to have had knowledge of the mortgage. The want of notice would be no excuse—*Nannu Mal v. Ram Chander*, 53 All. 334 (F.B.), 1931 A.L.J. 273, 132 I.C. 401, A.I.R. 1931 All. 277 (284-286).

435. Instances:—Where a village, without specification of boundaries is mortgaged as a whole, the mortgagee is, on the one hand, entitled to it as a security with any casual increase or decrease which may accrue to it; and is, on the other hand, subject to redemption by the mortgagor to the same extent—*Sadashiv v. Vithal*, 11 B.H.C.R. 32.

Where after the execution of two mortgages in respect of a house and certain lands appurtenant thereto, the mortgagor erected two other houses on the lands, and subsequently executed various mortgages in respect of the several houses, it was held that for the purposes of the security of the two prior mortgages, the two new houses were accessions to the mortgaged property, and became incorporated with the original subject of security—*Krishna Gopal v. Miller*, 29 Cal. 803. Where two houses and a bungalow and other property were first mortgaged to one person, and later on the houses and the bungalow were pulled down and

seven new houses were built thereon, which were mortgaged to another, the first mortgagee had a right to sell the seven new houses under a decree for sale obtained by him on his mortgage—*Bhooresao v. Mahomed*, 1 C.P.L.R. 38. Where the land containing a building is at first mortgaged, and machinery is subsequently planted in the building for permanent use, such machinery is an accession to the mortgaged property—*R. M. P. M. Chettyar Firm v. Siemens Ltd.*, 11 Rang. 322, A.I.R. 1933 Rang. 195. A theatre erected on a lease-hold land after the execution of the mortgage thereof, would be included in it, unless there was a contract to the contrary. The fact that the land mortgaged is a lease-hold is immaterial, for this Act makes no distinction between free-hold and lease-hold property—*MacLeod v. Kissan*, 30 Bom. 250. As a rule, buildings erected on the mortgaged land will be treated as an accession to the mortgaged property. But if a building is erected merely for temporary use, there being no intention that it should be attached to the land even slightly, the mortgagee will acquire no interest in it—*Jones on Mortgage*, §433; *Nannu Mal v. Ram Chander*, 53 All. 334 (F.B.), A.I.R. 1931 All. 277. The mortgage of the “entire taluka B” assessed to a certain revenue was held to comprise an alluvial mahal appertaining to the taluka, although it has been separately assessed—*Ganpat v. Saadat Ali*, 2 All. 787.

The purchase of *mokarari* interest is an accession to the *shikmi* right already mortgaged, and the purchaser at a sale in execution of the decree on the mortgage is entitled to claim the right to the *mokarari* interest as well, basing his right to it as an accession—*Surja Narain v. Nanda Lal*, 33 Cal. 1212. If, after the mortgage, the mortgagor sells a portion of the mortgaged land to the mortgagee and then repurchases it from the mortgagee, the mortgage attaches to that portion for the benefit of the mortgagee—*Deolic Chand v. Nirban*, 5 Cal. 253. The enlargement of, or the removal of incumbrances from, the estate of a mortgagor, effected by himself, will generally enure for the benefit of the mortgagee by increasing the value of the security—*Shyama Charan v. Ananda*, 3 C.W.N. 323. Where a mortgagee sub-mortgages his mortgage-rights and afterwards purchases from his mortgagor the right of redemption in the mortgaged property, such accession in interest enures for the benefit of the sub-mortgagee and he will be entitled to sue for the sale of the entire proprietary right in the same way as if the proprietary interest had been mortgaged to him from the first—*Ajudhia Pershad v. Man Singh*, 25 All. 46. A subsequent mortgagee who has foreclosed stands in the position of the mortgagor in relation to the prior mortgagee. If he is also in the position of a landlord with regard to the original mortgagors after the foreclosure, and the mortgagors (*i.e.*, his tenants) surrender the occupancy holding to him, the surrender operates as an accretion to the mortgage—*Bhagwantrao v. Subh Karan*, 25 N.L.R. 12, A.I.R. 1929 Nag. 225 (226).

436. Accession after decree:—In order that this section should apply, the accession to the mortgaged property must take place before the mortgage becomes extinguished. Where acquisitions are made by a mortgagor after the decree for sale has been passed or after the mortgaged property has been sold, such acquisitions do not form accretions to the mortgaged property so as to pass to the mortgagee or to the purchaser in Court-auction, but belong only to the mortgagor, as the mortgage-interest had ceased to exist at the time the acquisitions were made—*Kapniah Sivananjiah v. Sithay Gounden*, 41 M.L.J. 490, A.I.R. 1921 Mad. 627, 70 I.C.

367; *Haradhan v. Hargobind*, 2 P.L.T. 665, 63 I.C. 552. But in another Madras case, where a property was mortgaged by a Muhammadan woman and her eldest son, and *after the decree* on the mortgage was passed, the shares of the mortgagors were increased by inheriting to the share of another son who died after the passing of the decree, it was held that the increased shares were liable to be attached and sold in execution of the mortgaged decree—*Ajijuddin v. Sheik Budan*, 18 Mad. 492.

71. When the mortgaged property is a lease, * * and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Amendment:—The words “for a term of years” have been omitted by sec. 36 of the T. P. Amendment Act (XX of 1929), as they are unnecessary. These words have also been omitted from secs. 64 and 65.

This section is supplementary to sec. 64.

437. Principle:—The principle of this section is that a renewed lease is a graft upon the old stock and is therefore subject to the same equities regarding foreclosure and redemption as the old lease—*Moody v. Mathews*, 7 Ves. 174. The mortgagor of a renewable lease can hold a renewed lease only subject to the mortgage—*Leigh v. Burnett*, 29 Ch. D. 231. The mortgagee gets the benefit of the renewed lease, as security for his mortgage, although the renewal may have been obtained without any covenant for renewal—*Visnu Trimbak v. Tattia Vasudeb*, 1 B.H.C.R. 22; *Mahomed Assudollah v. Karamoottoolah*, 4 N.W.P. 11. The rule equally applies though the renewal was obtained after the original term had expired—*Pickering v. Bowels*, 1 Br. C.C. 197; or though the new lease was not to commence till after the expiration of the old one—*Rakestraw v. Brewer*, 2 P. Wms. 115. If a new lease or other interest of a like nature be obtained by the mortgagor or his representative or successor, either on a forfeiture (by any contrivance or otherwise) of the original lease, or by other means, the owner of the mortgage or charge will have the benefit for the purpose of the security, whether he be a volunteer or purchaser for valuable consideration, and although money was expended by a volunteer in obtaining the new interest—*Moody v. Mathews*, 7 Ves. 174.

If the mortgagor renders the renewal impossible by purchasing the reversion, the whole of the estate so acquired will be subject to the mortgage—*Trumper v. Trumper*, 14 Eq. 295.

72. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—

(a) for the due management of the property and the collec-

72. A mortgagee may spend such money as is necessary—

Rights of mortgagee to spend money.

(a) * * * *

tion of the rents and profits thereof;

(b) for its preservation from destruction, forfeiture, or sale;

(c) for supporting the mortgagor's title to the property;

(d) for making his own title thereto good against the mortgagor; and,

(e) when the mortgaged property is a renewable lease-hold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum.

Where the property is, by its nature, insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate. But the amount of such insurance

(b) for the preservation of the mortgaged property from destruction, forfeiture, or sale;

(c) for supporting the mortgagor's title to the property;

(d) for making his own title thereto good against the mortgagor; and,

(e) when the mortgaged property is a renewable lease-hold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum.

Provided that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

Where the property is, by its nature, insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property, and the premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal money or where no such rate is fixed, at the rate of nine per cent. per

shall not exceed the amount specified in this behalf in the mortgage-deed, or (if no such amount is therein specified) two thirds of the amount that would be required, in case of total destruction, to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

annum. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed, or (if no such amount is therein specified) two thirds of the amount that would be required, in case of total destruction, to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

Amendment:—This section has been amended by sec. 37 of the T. P. Amendment Act (XX of 1929). The reasons are stated below in proper places.

438. Application of section:—The rules contained in this section only reproduce the doctrine which the Courts of justice in India have uniformly adopted prior to the passing of this Act—*Girdhar Lal v. Bhola Nath*, 10 All. 611; *Bohra Thakur Das v. Collector*, 28 All. 593. Therefore the doctrines of this section will be applied to mortgages created before the enactment of the T. P. Act—*Ibid*.

This section, like sec. 69 of the Contract Act, is based upon the fiction of an implied request by the mortgagor—*Ram Tahal Sing v. Bissessur*, 23 W.R. 305 (P.C.); *Chedilal v. Bhagwan Das*, 11 All. 234. It will not however apply if the parties enter into an *agreement to the contrary*. Thus, where by the terms of a mortgage, the mortgagor personally covenanted to pay the municipal taxes, the mortgagee who pays the same cannot add them to the mortgage-amount under clause (b)—*Sayed Ibrahim v. Arumugathayee*, 38 Mad. 18 (23), 16 I.C. 877. So again, where the mortgagee has specially undertaken to incur the expenses of the litigation necessary to recover the lands, he is not entitled to claim such costs from the mortgagor under clause (c)—*Thekkamanengath v. Pazhiot*, 28 M.L.J. 184, 27 I.C. 989.

439. Mortgagee need not be in possession:—The language of the old section shows that it was limited to cases “*where during the continuance of the mortgage, the mortgagee took possession of the mortgaged property.*” In spite of these words, it was held that this section was not exhaustive and that a mortgagee making payments to save the mortgaged property from being sold for arrears of revenue had an additional charge on the property for the sums so paid by him, although he was not a mortgagee “in possession”—*Rakhohari v. Biprodas*, 31 Cal. 975; *Upendra v. Tara Prasanna*, 30 Cal. 794. The Bombay High Court also held that this section could not be taken to imply that a mortgagee *not in possession* had

no similar right to charge the mortgaged property for payment made by him in relation to the security and to add the amount to the original loan—*Nadershaw v. Shirin Bai*, 25 Bom.L.R. 839 (843), A.I.R. 1924 Bom. 264. So also, in an old Privy Council case it was held that a mortgagee, who was not a mortgagee in possession, had a right to tack to the mortgage the amount of revenue paid by him to save the estate—*Neugender Chunder v. Kaminee*, 11 M.I.A. 241 (259).

These words have therefore been omitted from the present section. The *Special Committee* observes:—

“It is inequitable to confine this section to a mortgagee in possession. With the exception of the provision in clause (a) relating to the management of the property and the collection of rents and profits, this section may apply to all mortgagees generally. A mortgagee, whether he is in possession or not, is entitled to spend money for the purposes mentioned in clauses (b), (c), (d) and (e), subject, as regards clauses (b) and (c), to the proviso that he should not be entitled to exercise that right unless the mortgagor is in default. It has been held that if a mortgagee who is not in possession spends money to preserve the property from forfeiture or sale he is entitled to be reimbursed for the money spent (I.L.R. 30 Cal. 794). In a Bombay case it was recently held (25 Bom.L.R. 843) that section 72 did not imply that a mortgagee not in possession had no right to charge the mortgaged property for payments properly made by him in relation to his security. Whether a mortgagee is in possession or not, it is to his interest to spend money to preserve his security and he should have a right to do so. We, therefore, propose that a mortgagee, though not in possession, should be entitled to spend such money as may be necessary for purposes mentioned in clauses (b), (c), (d) and (e), subject to the condition, as to (b) and (c), that he should not be entitled to do so until the mortgagor is in default.

“We also propose to omit the words in the first paragraph of the section, namely, ‘*during the continuance of the mortgage.*’ These words had to be in the original section as the section was confined to a mortgagee in possession. Further, as we propose to amend Order XXXIV of the Code of Civil Procedure so as to entitle the mortgagor to redeem at any time before the sale is confirmed or the foreclosure takes place under the provisions of the Code, these words have to be omitted in order that a mortgagee may be entitled, if occasion arises, to spend such money as may be necessary for these purposes until the sale is confirmed or a final decree for foreclosure is passed.”

If a usufructuary mortgagee, who is entitled to possession, fails to obtain possession, he has no charge on the property for the mortgage-money, but is only entitled to a money-decree under sec. 68, and consequently any amount paid by him to save the estate from sale stands on the same footing and cannot be charged on the mortgaged property—*per Subramania Ayyar, J. in Perianna v. Marudainayagam*, 22 Mad. 332 (336), following *Arunachalam v. Ayyavayyan*, 21 Mad. 476 (F.B.).

Where a usufructuary mortgagee instead of taking possession of the mortgaged property, granted a lease of it to the mortgagor, the amount of rent reserved being exactly equal to the amount of interest payable on the mortgage, and all the circumstances clearly indicated that the mortgage

and the lease formed one transaction, *viz.*, a usufructuary mortgage, it was held that the relation of the parties was that of mortgagor and mortgagee, and therefore the mortgagee was entitled to a charge on the mortgaged property for payment of Government revenue made by him, which ought to have been paid by the mortgagor—*Imdad Hasan Khan v. Badri Prosad*, 20 All. 401 (407, 408).

440. Necessary expenses:—The question whether the expenditure was 'necessary' is one of fact and must be determined according to the circumstances of each case—*Kadir Moidin v. Nepean*, 26 Cal. 1 (P.C.); *Jagannath v. Jagjiban*, 28 O.C. 221, 87 I.C. 829, A.I.R. 1925 Oudh 429.

The mortgagor and the mortgagee may enter into an agreement in the mortgage-deed that a fixed sum shall be charged annually for expenses to be incurred by the mortgagee in possession for certain specified purposes (*e.g.*, repairs to canals, expenses on account of village headmen, service inams of village headmen, etc.). There is nothing to prevent the mortgagor and mortgagee entering into a bargain as to what sum should be charged annually for expenses that may or may not exceed the agreed figure—*Chalikani Venkatarayanam v. Zemindar of Tuni*, 46 Mad. 108 (113) (P.C.), 71 I.C. 1035, A.I.R. 1923 P.C. 26.

Proviso:—The proviso curtails the power of the mortgagee to make the expenses under clauses (b) and (c), and requires him to call upon the mortgagor to make the expenses, before he can do it himself. Unless he gives notice to the mortgagor, the expenses will not be deemed to be 'necessary.'

"In the proviso we have inserted words to make it clear that a mortgagor is not liable for money spent by the mortgagee for the preservation of the mortgaged property or for support of the title unless he was called upon and has failed to take the necessary steps himself."—*Report of the Select Committee* (1929).

Clause (a) omitted:—Clause (a) relating to expenses for the management of the property and the collection of rents and profits has been omitted from this section but transferred to clause (h) of sec. 76. The *Special Committee* remarks:—

"By the omission of clause (a) from section 72 we do not propose to take away the right of a mortgagee in possession to spend money for the management of the property or collection of the rents and profits. As section 76 relates to a mortgagee in possession, we propose to make provision in that section for the recognition of the right."

442. Clause (b):—Expenses for preservation from destruction:—Where the property consisting of a thatched house was reconstructed and repaired to prevent it from falling out of repair and from becoming uninhabitable, the mortgagee was allowed a charge for the same with interest—*Jogendranath v. Raj Narain*, 9 W.R. 488; *Lakshman v. Hari Dinkar*, 4 Bom. 584. Where the mortgage-deed itself provided that the mortgagee should rebuild the mortgaged house if it was destroyed by accident, and the house having been destroyed by accidental fire the mortgagee rebuilt the house, *held* that the cost of such rebuilding must be paid by the mortgagor before redemption—*Sakharam Shet v. Amtha*, 14 Bom. 28. Where the mortgaged *katcha* house fell down during the rains, and was rebuilt into a *pucca* house of the same size and pattern by the mortgagee, and it appeared that the re-building was within the contemplation of the parties

when the mortgage-deed was executed, *held* that the mortgagee's claim to recover the value of the building should be allowed—*Qasim v. Bhagwandeem*, 7 O.W.N. 488, A.I.R. 1930 Oudh 337 (338), 126 I.C. 397. See also notes under the new sec. 63A for *improvements*. As regards *repairs*, see sec. 76 (d).

444. Preservation from forfeiture or sale:—Upon the general principle of law on which the doctrine of salvage and subrogation proceeds, a mortgagee in possession is entitled to claim sums paid for arrears of Government revenue or of rent or in satisfaction of a decree, before the property which he saved from the revenue or execution sale could be redeemed by the mortgagor. Such payments are looked upon in the nature of salvage payments and are therefore recoverable as part of the mortgage money—*Girdhar v. Bholanath*, 10 All. 611; *Upendra v. Tara Prasanna*, 30 Cal. 794; *Manohar v. Hazarimull*, 35 C.W.N. 1040 (1044) (P.C.); *Anandi v. Dur Najaf Ali*, 13 All. 195; *Imdad Hasan v. Badri Prosad*, 20 All. 401 (408); *Ram Sewak v. Sheo Naik*, 45 All. 388 (390); *Rakhohari v. Bipra Das*, 31 Cal. 975 (978); *Nilawa v. Krishnappa*, 8 Bom.L.R. 350; *Rajkumar Lal v. Jaikaram Das*, 5 P.L.J. 248, 57 I.C. 653; *Ma Pwa v. K. P. S. A. R. P. Firm*, 12 Bur.L.T. 36, 43 I.C. 190; *Venkata Narasimha v. Kuppa Chetti*, 40 M.L.J. 524, 63 I.C. 24; *Ambika v. Ramgati*, 14 I.C. 418. The mortgagee is entitled to add to the mortgage-money payments made by him towards rent which the mortgagor was bound to pay to his superior landlord, although the mortgagee professed to make those payments not as mortgagee but as owner under a purchase which was afterwards found by the Court to be invalid. When the purchase went off, the parties were remitted to their original position, and the mortgagee must be credited with those payments as made by him in his capacity as mortgagee, the only capacity that he had when the conveyance failed—*Foodeni v. Azhar Hussain*, 10 Pat. 210, A.I.R. 1931 Pat. 325 (326), 131 I.C. 814.

The right of the mortgagee under this clause will be subject to the obligation imposed upon him by sec. 76 (c). This section imposes an obligation to pay the revenue and Government charges when they can be paid *out of the income*. If they can be so paid, the mortgagee cannot recover them under this section as a lien upon the property. It is only when they cannot be so paid and the mortgagee has paid them out of his own pocket that he can recover them as a lien under this clause—*Farzand Ali v. Kaniz Fatima*, 22 O.C. 270, 54 I.C. 264.

The word 'sale' in this clause is a sale *ejusdem generis* with destruction and forfeiture, that is, a sale by which the mortgagee's security is likely to be imperilled. It does not therefore contemplate a sale merely of the equity of redemption. This section includes only payments made to save the security itself—*Venkata Narasimha v. Kuppa*, 40 M.L.J. 524, 63 I.C. 24 (*per* Ramesam, J.; Spencer, J. contra); *Hardeo v. Deputy Commissioner*, 1 Luck. 367, A.I.R. 1926 Oudh 281 (286); *Rajendra Prosad v. Bahuria*, 1 P.L.J. 589, 38 I.C. 232; *Sheo Dulare v. Batasha*, 16 O.C. 48, 19 I.C. 744. In other words, a sale which does not affect the interest of the mortgagee is not covered by this section—*Gaya Prosad v. Gur Dayal*, 22 O.C. 32, 51 I.C. 549. In Allahabad, however, a sale merely of the equity of redemption is not permitted where the property is subject to a usufructuary mortgage, but the entire property is sold, and therefore a usufructuary mortgagee paying off a decree for sale of the property can be said to have saved his security from sale, and is entitled to tack the

amount so paid to his mortgage-money—*Abdul Qayyum v. Sadrudin*, 27 All. 403. Where a prior mortgagee deposited money under O. 21, r. 89 to set aside a sale made at the instance of a puisne mortgagee, he must be allowed to add the amount to the mortgage-money, because the sale proclamation purported to sell not merely the equity of redemption but the entire property—*Jagannath v. Jagjiwan*, 28 O.C. 221, A.I.R. 1925 Oudh 429 (431).

This section does not apply where a subsequent mortgagee makes a payment to the prior mortgagee who has got a decree for the sale of the property. The subsequent mortgagee does not acquire any *additional charge* on the property in respect of such payment—*Perianna v. Marudainayagam*, 22 Mad. 332 (335). Such payment has merely the effect of transferring the right of the prior mortgagee to the subsequent mortgagee—*Ibid.* See sec. 74 (now 92).

This section contemplates payments of revenue or other dues for non-payment of which the mortgaged property may be *immediately and summarily* sold. A payment of a public charge for non-payment of which the property is not liable to immediate sale (*e.g.*, road-cess) does not constitute a charge upon the property—*Rajendra Prosad v. Bahuria*, 1 P.L.J. 589, 38 I.C. 232, following *Upendra v. Tara Prosanna*, 30 Cal. 794. So also, money paid for municipal tax is not allowed to be charged on the property (for it is only the moveable and not the immoveable property which is liable to be sold in the first instance for non-payment of tax)—*Syed Ibrahim v. Arumugathayee*, 38 Mad. 18 (23); *Gopala Krishna v. Sanjeeva*, 38 M.L.J. 228, 55 I.C. 333.

445. Clause (c)—Supporting the mortgagor's title:—The mortgagee in possession will be allowed the sum expended in supporting the mortgagor's title to the estate, where it has been impeached, or in otherwise doing what is essential to protect the mortgagor's title—*Godfrey v. Watson*, 3 Atk. 517. A mortgagee is allowed proper costs, charges and expenses incurred by him in relation to the mortgage debt or mortgage security including the costs of litigation properly undertaken by him—*Nadershaw v. Shirinbai*, 25 Bom.L.R. 839, A.I.R. 1924 Bom. 264, 87 I.C. 129. Where the mortgagor's title happens to be impeached (*e.g.*, by tenants), the costs incurred by the mortgagee in defending such title would come clearly within the rule in this clause so as to entitle the mortgagee to charge such expenses against the estate—*Pokree Saheb v. Pokree Beary*, 21 Mad. 32. Where the mortgagee had to take criminal proceedings against persons disputing mortgagor's title and setting up the title of a stranger, he could recover the costs from the mortgagor—*Venkataswami v. Muthusami*, 34 M.L.J. 177, 45 I.C. 949. But where a mortgagee with knowledge that a third person had an interest in the mortgaged property accepted a mortgage of the property, he cannot claim from the mortgagor the costs incurred by him in the litigation for opposing the claim of that person—*Ram Ditta Mal v. Karm Devi*, 190 P.L.R. 1912, 17 I.C. 243.

446. Clause (d)—Defence of mortgagee's title against mortgagor:—The mortgagee is further entitled to add to his mortgage-money the necessary expenses of defending his own title against the mortgagor, for instance, the expenses of defending an action brought by the mortgagor to set aside the mortgage, which was dismissed with costs—*Fardley v. Knight*, 41 Ch. D. 537; *Dattaram v. Vinayak*, 28 Bom. 181; or the costs incurred by the mortgagee in defending an unsuccessful redemption-suit

brought by the mortgagor—*Varadarajulu v. Dhanalakshmi*, 16 M.L.T. 365, 26 I.C. 184.

447. Clause (e)—Renewal of leases:—Since the mortgagor is entitled to the benefit of the renewal of a lease obtained by the mortgagee, (sec. 64), it is but fair and equitable that the latter should be re-imbursed the expenses incurred for such renewal. A mortgagee is entitled to charge the mortgagor for renewal though there be no covenant to that effect—*Lacon v. Mertins*, (1743) 2 Atk. 1 (at p. 4).

448. “May add such money to the principal”:—The provision of this section is merely *permissive* (cf. the word ‘may’) and does not make it obligatory on the mortgagee to add the expenses incurred by him to the principal money. He is entitled to sue the mortgagor personally—*Venkataswami v. Muthusami*, 34 M.L.J. 177, 45 I.C. 949. Thus, where the mortgagee has spent money to preserve the property from sale under clause (b), this section does not take away from him the right to recover the money personally by a separate suit—*Parsotam v. Jaijit*, 1890 A.W.N. 90; *Nikka Mal v. Sulaiman*, 2 All. 193. So also, where the mortgagee had to institute criminal proceedings against the tenants who had cut off and carried away the crops on the land asserting the title of a stranger as owner, he was entitled to recover the expenses of the prosecution by bringing a suit against the mortgagor or his heir personally—*Venkatasami v. Muthusami*, 34 M.L.J. 177, 45 I.C. 949. The mortgagee can elect either to sue for the money separately or to add it to the mortgage-money under this section. But the two remedies cannot be concurrently enforced, and consequently when he had sued for and obtained a personal decree for such sum, he could not add it again to the mortgage debt—*Imdad Hasan v. Badri Prasad*, 20 All. 401 (408). If he relinquishes his lien for the sum spent, he cannot afterwards enforce it; but he is not precluded from bringing a suit to recover the money personally from the mortgagor. Thus, where the mortgagor deposited in Court under sec. 83 the mortgage-money only but not the money paid by the mortgagee for Government revenue, and the latter accepted the deposit and gave up possession of the property, *held* that he could not afterwards sue for the recovery of the amount by sale of the mortgaged property, but he might bring a simple money suit for the amount—*Anandi Ram v. Dur Najaf Ali*, 13 All. 195.

Under the English law, the expenses cannot be recovered from the mortgagor personally, by a separate suit, except where there is an express agreement by the mortgagor to that effect. They are made recoverable as the price of redemption, *i.e.*, the mortgagee can only add the money to the mortgage amount—*Ex parte Fewings*, 25 Ch. D. 338; *Lacon v. Mertins*, 3 Atk. 1. The same view has been taken in *Sheo Dulari v. Batasha*, 16 O.C. 48, 19 I.C. 744; *Jagannath v. Jagjiwan*, 12 O.L.J. 289, and *Nadershaw v. Shirinbai*, 25 Bom.L.R. 839, A.I.R. 1924 Bom. 264, 87 I.C. 129.

449. Interest:—All money spent under this section by the mortgagee shall carry interest at the same rate as the principal, and where no such rate is fixed, at 9 per cent. per annum. The interest shall be calculated from the time the expense was incurred—*Quarrel v. Beckford*, 1 Maddock 281; *Gaya Prasad v. Gur Dayal*, 22 O.C. 32, 51 I.C. 549. The interest shall be simple and not compound—*Kishori Mohun v. Ganga Babu*, 23 Cal. 228 (P.C.). No interest is allowed on money spent on improvements—*Ibid*. A mortgagee is, in the absence of a contract to the contrary,

entitled to interest on the money paid in respect of the Government revenue in excess of the amount payable as such on the date of the original mortgage—*Kaniz Fizza v. Datadin*, 2 O.W.N. 650, 90 I.C. 184, A.I.R. 1925 Oudh 678.

Insurance:—The last two paras of the section are taken from sec. 101 (1) (ii) of the English Law of Property Act, 1925.

The proportion of two-thirds has been fixed upon because mortgagees seldom lend more than two-thirds of the value of the property which is given as security.

In the penultimate paragraph, certain words have been changed by the Amendment Act of 1929, to maintain uniformity with the preceding para of the section. The *Special Committee* observes:—

“In the penultimate paragraph of section 72 it is stated that a sum paid as insurance premium shall be a charge on the mortgaged property, while the second paragraph provides that sums mentioned in clauses (a) to (e) should be added to the principal money. It is not clear whether any distinction is really intended between insurance premia and other necessary costs and charges. The sums payable for insurance ought to be treated on the same footing as those spent for necessary costs and charges. We are, therefore, of opinion that such sums should be added to the principal money and should carry the same rate of interest.”

73. Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus (if any) of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part.

Charge on
proceeds of
revenue-sale.

73. (1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale-proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

Right to pro-
ceeds of
revenue sale
or compen-
sation on
acquisition.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment

for the time being in force providing for the compulsory acquisition of immoveable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

Amendment:—This section has been re-drafted by sec. 38 of the T. P. Amendment Act (XX of 1929). The reasons are stated below.

450. Principle:—The principle embodied in this section is the principle of substitution of properties and securities in favour of a person who through no fault of his own is deprived of the original properties and securities—*Subbaraju v. Seetharama Raju*, 39 Mad. 283 (287). This section contemplates that when a mortgaged property is sold for arrears of revenue or rent not through any fault of the mortgagee, the mortgage lien is transferred to the surplus sale proceeds—*Nim Chand v. Asutosh*, 9 C.W.N. 117. The surplus sale-proceeds in the hands of the Collector after sale of the mortgaged property for arrears of revenue must be taken to represent the property itself, so that a decree obtained by the mortgagee declaring his lien on the property will have the effect of giving him a lien on the surplus money itself—*Krishtodas v. Ramkant*, 6 Cal. 142 (147); *Gosto Behary v. Shib Nath*, 20 Cal. 241 (244). The object of this section is to relieve the mortgagee of the effects of the injury which he would suffer by reason of the property being sold, and to give him a right over the residue of the sale proceeds—*Beni Prosad v. Rewat Lal*, 24 Cal. 746 (749).

451. Scope and application of section:—This section is intended to refer to cases where the effect of a sale for arrears of revenue or rent is to nullify the mortgage—*Beni Prosad v. Rewat Lal*, 24 Cal. 746 (749). Where the sale is *not free from* incumbrances, the mortgagee can lay no claim to the surplus sale-proceeds but must enforce his lien against the property in the hands of the auction purchaser—*Prem Chand v. Purnima*, 15 Cal. 546; *Narotam v. Sukraj*, 3 Luck. 719, 5 O.W.N. 791, 116 I.C. 49, A.I.R. 1928 Oudh 442 (448). Thus, the sale, in execution of a rent decree under sec. 152 Oudh Rent Act, of an under-proprietary holding which has been mortgaged by the judgment-debtor passes only the interest of the judgment-debtor, i.e., his equity of redemption; that is, the holding is not sold free from incumbrances, and consequently this section has no application—*Narotam v. Sukhraj*, *supra*.

The surplus sale-proceeds must be regarded as the shape into which the mortgage security has been converted, and as before such conversion the security could not be split up into parts, and the mortgagee was entitled to realise his money out of the whole of it, its conversion by sale into money will not affect his rights in this respect, and he has a claim on the whole and on every part of the surplus proceeds. So long as his claim is not satisfied, the unsecured creditor of the mortgagor will not have any right to the sale-proceeds—*Gosto Behari v. Shib Nath*, 20 Cal. 241 (244). See sub-sec. (3).

This section contemplates not only the cases where by reason of the sale for arrears of revenue or rent the lien is *actually* destroyed but it may equally apply to a case where the lien is *in jeopardy*. Thus, the section may be applied not only where the revenue-sale takes place actually free from incumbrances, but also where the property is sold to the purchaser with power to avoid all incumbrances, as in a rent-sale under sec. 167 of the Bengal Tenancy Act. In such a case, the mortgagee may abandon his lien upon the mortgaged property and claim to realise the demands from the surplus sale-proceeds (even though the purchaser has not yet avoided the incumbrance)—*Nim Chand v. Asutosh*, 9 C.W.N. 117 (118). In another case it has been held that whether the property is sold with or without the power to annul incumbrances, in either case the mortgagee has a right under this section to claim payment out of the surplus sale-proceeds. The mortgagee's right under this section is not affected by anything contained in secs. 159, 161-169 of the Bengal Tenancy Act—*Gobind Sahai v. Sibdut*, 33 Cal. 878 (880).

But this is an enabling section; it entitles the mortgagee to claim payment out of the surplus sale-proceeds; and there is nothing in this section which would indicate that the remedy of the mortgagee is confined only to the surplus sale-proceeds. So, where a property is sold for arrears of rent with power to annul all incumbrances, then so long as the incumbrances are not validly annulled under sec. 167, Bengal Tenancy Act, the mortgagee has a right to proceed against the property in the hands of the purchaser—*Rasik Chandra v. Jagabandhu*, A.I.R. 1929 Cal. 392 (394). 113 I.C. 904.

When a property is sold under a decree obtained by a first mortgagee in a suit in which the puisne incumbrancers were parties, it passes into the hands of the purchaser discharged from all incumbrances. But equity regards the rights of the puisne incumbrancers not as extinguished or discharged by the sale but transferred thereby to the surplus sale-proceeds. The principle laid down in this section for the purpose of following the sale-proceeds in the hands of third parties should be applied in favour of a subsequent incumbrancer in respect of the surplus sale-proceeds of property sold to satisfy the claim of a first mortgagee—*Berhamdeo v. Tara Chand*, 33 Cal. 92 (111, 112).

452. Acquisition of property under Land Acquisition Act:—See sub-section (2). Even prior to the enactment of this sub-section it was held that the rule in this section should not be confined only to revenue-sales, but would equally apply if the security was otherwise destroyed, *e.g.*, if the property was taken under the Land Acquisition Act. In such a case the mortgagee's right in the land so acquired was transferred to the compensation money and he could lay claim to the said money. The money paid into the Treasury was to be considered as money or moveable

property impressed with the trusts and obligations of the immoveable property which it represented—*Viraraghava v. Krishnasami*, 6 Mad. 344; *Jotoni Chowdhurani v. Amar Krishna*, 13 C.W.N. 350, 1 I.C. 164; *Venkatarama v. Esumsa*, 33 Mad. 429; *Prag Din v. Nankar*, 7 O.W.N. 217, A.I.R. 1930 Oudh 292 (294), 123 I.C. 56. Thus, where during the pendency of a suit by the mortgagee in which he obtained a preliminary decree, a part of the mortgaged property was compulsorily acquired under the Land Acquisition Act, the mortgagee was held to be entitled to an injunction restraining the mortgagor from taking the purchase money out of the hands of the Land Acquisition Collector—*Asutosh v. Babu Lal*, 5 P.L.J. 650, 59 I.C. 513, 2 P.L.T. 110. (*Contra*—*Basa Mal v. Tajammal*, 16 All. 78).

The new sub-section (2) gives effect to this view. The *Special Committee* observes:—

“The present section deals only with the case where the mortgaged property is sold for the arrears of revenue or rent. There is a conflict of decisions on the point whether the principle underlying the section applies to a case where the mortgaged property is compulsorily acquired under the Land Acquisition Act, 1894. In I.L.R. 16 All. 78, the Allahabad High Court held that a mortgagee had no charge on the amount of compensation awarded for the acquisition of the mortgaged property under the Land Acquisition Act and that the mortgagee ought to have claimed apportionment in acquisition proceedings. A contrary view was taken in I.L.R. 6 Mad. 344, and the Allahabad decision was dissented from in Calcutta and Patna (13 C.W.N. 350; 5 Pat. L.J. 650). It has been held that the compulsory acquisition of a property does not amount to its destruction within the meaning of section 68 and that the property acquired is converted into money (I.L.R. 13 Mad. 321). According to the general principle of ‘conversion’ on which section 73 is based, the amount awarded as compensation is impressed with the charge to which the land is subject. In England, where money is paid into Court as the proceeds of real estate converted by compulsory powers under Acts of Parliament, as under section 69 of the Land Clauses Consolidation Act, it usually remains in Court subject to the rights of the parties interested in it to have it reinvested in land, and it is considered to be impressed with the quality of real estate (*In re Stewart*, 1 Sm. and G. 32, 1 W & T.L.C. 393, 8th Edn.). The view taken by the majority of the High Courts is in accordance with the general principle stated above and we propose to give effect to it by the addition of sub-section (2) to section 73.”

In some cases it was held that if the mortgaged property was taken under the Land Acquisition Act, the property was to be considered as ‘destroyed’ within the meaning of sec. 68, and the mortgagee’s remedy was to require another security from the mortgagor, in default of which, he was to sue for the mortgage-money—*Sajjada v. Janki*, 20 O.C. 256, 42 I.C. 793; *Prakash v. Hasan Banu*, 42 Cal. 1146 (1152). This view is no longer correct.

453. Mortgagee’s remedy:—In the old section it was said that the mortgagee had a “charge” on the surplus sale-proceeds; in the present section the word ‘charge’ has been omitted, and it is provided that the mortgagee can claim payment out of the sale-proceeds. The reason of this amendment has been thus stated:—

“Section 73 at present provides that a mortgagee has merely a charge

on the surplus sale-proceeds. The use of the word 'charge' appears to us to be unhappy inasmuch as a charge under section 100 relates to immoveable property and is enforced as a simple mortgage. The procedure for enforcing a simple mortgage obviously does not apply to the enforcement of a claim against a fund. The use of the word also leaves the remedy of the mortgagee uncertain. We, therefore, propose to avoid its use and to provide that the mortgagee shall be entitled to claim payment out of the surplus fund or compensation money payable to the mortgagor as the case may be."—*Report of the Special Committee*.

Under the old section also it was held in a Patna case that although the mortgagee had a charge upon the surplus sale-proceeds after the sale for arrears of Government revenue, and could follow the surplus proceeds of the property, still he was not bound to do so, and the existence of this statutory charge was no bar to his seeking a *money-decree against the mortgagor* or his successors—*Benarasi v. Mohiuddin*, 3 Pat. 581 (590).

In the circumstances mentioned in this section the question frequently arises, what would be the remedy of the mortgagee if the surplus sale-proceeds are not sufficient to satisfy his debt? It must be admitted that the mere acceptance of the surplus sale-proceeds do not amount to a relinquishment by the mortgagee of his right to recover by all legal means the remaining mortgage-money due to him—*Ganga Sahai v. Tulsi Ram*, 25 All. 371 (373). The remedy of the mortgagee must be determined according to the circumstances of each particular case. It has been held by the Calcutta High Court that if the mortgagee obtains a decree on his mortgage, and before that decree is executed the property is sold under sec. 165 Bengal Tenancy Act in execution of a rent-decree obtained against the mortgagor, and the surplus sale-proceeds are insufficient to satisfy the mortgage-decree, the mortgagee is entitled to have the balance of his decree satisfied *out of the property* in the hands of the purchaser; in other words, the property in the hands of the purchaser is liable to be sold again to satisfy the deficiency of the mortgage-debt—*Parameshwar v. Anath Bandhu*, 51 I.C. 333 (335). But if the mortgaged property sold for arrears of rent under sec. 165 Bengal Tenancy Act is purchased by the *mortgagee himself* the inference is that the charge in respect of *this* property is extinguished (old s. 101 of this Act), although he may not have taken steps to annul the incumbrance under sec. 167 B. T. Act., and if the surplus sale-proceeds are insufficient to satisfy his mortgage-debt, he is entitled to proceed for the satisfaction of the balance of his mortgage-decree against the *other properties* of the mortgagor—*Mastulla v. Jan Mamud*, 28 Cal. 12 (16, 17). Where the mortgaged property sold for arrears of revenue was purchased by the *mortgagor benami* in the name of a third person, so that the property returned into the possession of the mortgagor, the mortgagee would be entitled to put up the same property to satisfy the balance of the mortgage-money that remained due after taking out the surplus proceeds of the previous revenue-sale—*Ganga Sahai v. Tulsi*, 25 All. 371 (374). The proprietor of revenue-paying estate executed a mortgage, and then subsequently granted a *putni* in favour of another person who had it registered under sec. 40 of Act XI of 1859 (Bengal Revenue Sales Act). The mortgagee obtained a decree on his mortgage in a suit in which the *putnidar* was made a party. After the decree the estate was sold for arrears of revenue subject to the incumbrance of the *putni*, and was purchased by the mortgagee himself. He then withdrew the surplus sale-proceeds, by which his decree was partly

satisfied, and for the unsatisfied balance he applied for sale of the *putni* interest. *Held* that the *putni* interest was liable to be sold for the balance of the mortgage-debt—*Susilabala v. Dinabandhu*, 14 C.W.N. 186 (190), 5 IC. 70.

Where the mortgaged property has been sold for arrears of revenue, the mortgagee will be entitled to the surplus sale-proceeds not only in the hands of the Collector, but also in the hands of certain money-decree-holders of the mortgagor who have drawn out the sale-proceeds from the collectorate—*Gosto Behary v. Shib Nath*, 20 Cal. 241 (244).

If the mortgaged property is sold owing to the mortgagor's default in paying the revenue, and the property is purchased by the *mortgagor himself*, or by some third person who afterwards sells it to the mortgagor, the mortgage is not extinguished and may still be enforced against the property, as if there had been no sale, for the mortgagor cannot take advantage of his own wrong—*S. Lakshmayya v. Intoory Bolla Reddy*, 26 Mad. 385 (387). Similarly, if after a sale of the mortgaged property for arrears of revenue, the mortgagor's interest in the property is revested in him in consequence of the *sale being set aside*, the mortgagor ceases to have any interest in the sale-proceeds, and the mortgagee is in a position to fall back upon his original security and has no more claim on the sale-proceeds which no longer represent the interest of the mortgagor—*Rash Behari v. Kusum Kumari*, 86 I.C. 882, A.I.R. 1925 Cal. 1145. If the property is sold for arrears of rent and purchased by the mortgagee himself, the mortgage is extinguished, and the mortgagee's claim is transferred to the surplus sale-proceeds—*Hem Chandra v. Tafazzal*, 8 C.W.N. 332 (336).

454. Sub-section (3):—"In the amended section we have also provided for priorities as in the case of a charge. The mortgaged security being converted into money, we see no reason why the mortgagee should have to wait until the due date, particularly when he can no longer bring a suit to enforce the mortgage."—*Report of the Special Committee*.

This clause lays down that the claim of the mortgagee shall prevail over all other unsecured claims. Therefore, so long as the mortgagee's claim is not satisfied, the unsecured creditors will not be entitled to take any portion of the surplus sale-proceeds, and if any one takes any portion of the money, he does so under the liability of being sued in case the mortgagee finds any difficulty in getting himself paid. The unsecured creditors are not entitled to draw any portion of the sale-proceeds, even though they leave enough in the hands of the Collector—*Gosto Behary v. Shib Nath*, 20 Cal. 241 (244).

74-75. [Omitted.]

These two sections have been omitted here but re-enacted as sections 92 and 94, with substantial amendments.

"These sections are based on what is known as the principle of 'subrogation'. For reasons stated in the notes in the proposed new sections 92 and 94, we propose to delete these sections."—*Report of the Special Committee*.

76. When, during the continuance of the mortgage, the

Liabilities of mortgagee in possession. mortgagee takes possession of the mortgaged property—

- (a) he must manage the property as a person of ordinary prudence would manage it if it were his own;

- (b) he must use his best endeavours to collect the rents and profits thereof;
- (c) he must in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature *and all rent* accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;
- (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;
- (e) he must not commit any act which is destructive or permanently injurious to the property;
- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;
- (g) he must keep clear, full, and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor at his request and cost, true copies of such accounts and of the vouchers by which they are supported;
- (h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses *properly incurred for the management of the property and the collection of rents and profits and the other expenses* mentioned in clauses (c) and (d) and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest * * * and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus (if any) shall be paid to the mortgagor;
- (i) when the mortgagor tenders or deposits, in manner

hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his * * * receipts from the mortgaged property from the date of the tender, or from the earliest time when he could take such amount out of Court as the case may be, *and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.*

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when Loss occasioned by his default. accounts are taken in pursuance of a decree made under this chapter, be debited with the loss (if any) occasioned by such failure.

Amendment:—This section has been amended by sec. 40 of the Transfer of Property Amendment Act (XX of 1929). Besides the addition of the italicised words in clauses (c), (h) and (i), the words “on the mortgage-money” have been omitted from clause (h), and the word “gross” has been omitted from clause (i). The reasons are stated below in proper places.

463. Scope of section:—Section 76 does not apply to a mortgage by the lessee. This section defines the duties of the mortgagee to the mortgagor but has no bearing on his liabilities to the lessor. Even sec. 109, which defines the rights and liabilities of the lessor’s transferee is curiously silent as to the assignee of the lessee—*Ardeshir v. K. D. & Bros.*, 27 Bom.L.R. 553, 88 I.C. 79, A.I.R. 1925 Bom. 330.

This section is not restricted to usufructuary mortgages. Where under a deed of mortgage by conditional sale, the mortgagee took possession of the mortgaged property with the consent of the mortgagor when the latter failed to pay the money on the due date, *held* that this section applied, and the sums received by the mortgagee during his possession should be applied in reduction of the mortgage-debt in view of clause (i) of this section—*Afsar Shaik v. Saurava Sundari*, 25 C.L.J. 560, 40 I.C. 371. The Allahabad High Court has said that this section applies to a case where *during the continuance* of the mortgage the mortgagee takes possession of the mortgaged property; and that therefore it cannot apply where the mortgage is *in its inception* usufructuary—*Kallu v. Ganesh*, 116 I.C. 747, A.I.R. 1929 All. 348 (349). But this view has not been accepted by the Oudh Chief Court, which interprets the expression “during the continuance of the mortgage” as meaning “after the contract establishing the relationship of mortgagor and mortgagee between the parties has been entered into and established, and till the time the mortgage comes to an end or is extinguished”; and consequently it does not exclude a mortgage which is in its inception usufructuary—*Lakshmi v. Mohamdi*, 7 Luck. 454, A.I.R. 1932 Oudh 123 (132), 137 I.C. 102.

It should be noticed that this section uses different terms in the

different clauses, such as “rents and profits” “income” “receipts” “all sums received” according to the context in which they occur. This has been explained by the *Special Committee* as follows:—

“In clauses (b) and (d) of the section the term ‘rents and profits’ is used, while in clause (c) the word ‘income’ is used. In clauses (h) and (i) and also in section 77 the word ‘receipts’ is used. In our opinion the use of these different terms is appropriate in regard to the context in which they are used and they are in contradistinction to one another. Government revenue, public charges and rent are always paramount charges on immoveable property and the failure to pay them renders the property liable to be sold. The liability of a person in occupation of the property, including a mortgagee in possession, is commensurate with his right to enjoy the income of the property. In clause (c), therefore, it is provided that in the absence of a contract to the contrary it is the primary duty of a mortgagee in possession to pay the aforesaid dues out of whatever income he may realise from the property. He cannot claim any deduction until these liabilities are satisfied. In clause (d), however, the term ‘rents and profits’ is used to indicate that a mortgagee is liable to make necessary repairs to the property out of the balance of the actual realisations from the property after deducting therefrom the payments mentioned in clause (c) and the interest on the principal money. He is not bound to spend money on repairs out of his own pocket (I.L.R. 15 Mad. 290). Clause (h) refers to the manner in which the account he is bound to keep under clause (g) is to be taken. Under clause (g) he is to keep a clear, full and accurate account of ‘all sums received.’ Clause (h) provides how the balance of the sums received by a mortgagee after deducting outgoings mentioned therein is to be debited towards the payment of the mortgage-money. The clause properly uses the term ‘receipts’ and show that they are to be actual and gross realisations.”

464. What amounts to mortgagee’s “taking possession”:—“It is not necessary that the mortgagee should be in actual physical occupation of the property. He may equally effectually be in possession through his agent or receiver.”—*per* North, C. J. in *Richards v. Overseers of Kidderminster*, (1896) 2 Ch. 212 (219, 220). He may be said to be in possession by receiving rent from the tenants who occupy the lands. But the simple receipt of rents and profits by a mortgagee will not suffice to clothe him with the character of a mortgagee in possession. “It ought to be shown not only that he gets the amount of the rents paid by the tenants, but that he receives it in such a way that it can be properly said that he has taken upon himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate”—*per* Cotton L.J. in *Noyes v. Pollock*, (1886) 32 Ch. D. 53 (61). Therefore, where the mortgagee wrote to the agent of the mortgagor, who was in the habit of receiving the rents of the estate and applying them in payment of interest, enclosing notices to the tenants to pay the rents to the mortgagee, to be served if the mortgagor should attempt to interfere, and the agent replied promising to pay the rents to the mortgagee and the notices were never served on the tenants but the agent paid the rents as he received them to the mortgagee, it was held that the mortgagee could not be said to be a mortgagee in possession—*Ibid.*

The possession taken by the mortgagee may be independent of the

provisions of the mortgage-deed. Thus, where a mortgage-deed is silent as to possession and the mortgagee takes possession of the mortgaged property, he is accountable for the rents and profits received—*Madari v. Baldeo Prosad*, 27 All. 351.

Possession by mortgagee in any other capacity:—This section is not in terms restricted to a mortgagee who takes possession as mortgagee, but the principle of this section would apply to all mortgagees who get into possession by way of further security for the payment of their debt. Thus, where the mortgagee was let into possession of the mortgaged house under a lease, for the same period as the mortgage, on the footing that the estimated rent of the house should be set off month by month against the monthly interest, *held* that this section applied and the rent of the house would be set off against the interest in taking accounts. And it makes no difference to this proposition that the mortgagee-lessee was in the position of a tenant holding over after the lease-period had expired—*Vengubai v. Ramaswami*, 26 L.W. 450, 1927 M.W.N. 749, A.I.R. 1927 Mad. 964 (965), 105 I.C. 419. Where the mortgagee entered into possession of the mortgaged property by virtue of a lease under which the rent was appropriated by the lessee towards the reduction of the mortgage-debt, *held* that the substance of the transaction was that the lessee had taken possession in his own interest in order to secure payment of the amount due to him, and the relation of the parties was that of mortgagor and mortgagee; the latter was therefore bound to pay the Government revenue payable in respect of the property under clause (c) of this section—*Kishundial v. Mahabir*, 5 P.L.J. 492, 1 P.L.T. 711, 58 I.C. 291. A prior mortgagee who takes a lease of the mortgaged property subsequent to the execution of a puisne mortgage is chargeable as a mortgagee in possession and not as a lessee—*Ibid*.

465. Clause (a):—He must manage with ordinary prudence:—The mortgagee in possession is in equity considered in some measure in the light of a trustee and thus the same measure of prudence is prescribed in the clause as in sec. 15, Trusts Act. A mortgagee in possession has his own right of managing the lands; and he is not in any sense dependent upon the consent of the mortgagor in determining as to what rent he should reasonably seek from a tenant in respect of a particular land and what tenant he should keep—*Barjorji v. Shripatprasadji*, 29 Bom. L. R. 215, A.I.R. 1927 Bom. 145 (148), 100 I.C. 1033. A usufructuary mortgagee may enter into any arrangement which will facilitate the recovery of what he may consider to be a reasonable return for the money; and for this purpose he may *lease out* the mortgaged property either to third parties or to the mortgagor himself—*Md. Karamat Ali v. Ganeshi Lal*, 49 All. 658, A.I.R. 1927 All. 552 (554), 25 A.L.J. 467, 101 I.C. 516. But he cannot create a right beyond his own term, *i.e.*, he cannot grant a *permanent* lease or a lease for a period lasting *beyond the term* of his mortgage. Such a lease is inoperative so far as the mortgagor is concerned, and he is entitled to eject the lessee—*Jhagru v. Raghunath*, 10 P.L.T. 625, 119 I.C. 551, A.I.R. 1929 Pat. 630 (632).

A mortgagee in possession is bound to cultivate the ordinary crops which the land is capable of yielding. But he is not bound to cultivate any other particular crop. He may cultivate it as he likes, and with as little profit to himself as he likes, and so long as the mortgagor chooses to allow him to retain possession, no objection can be made that he is not

doing his best to help the former to pay off the debt. The general rule is that the mortgagee in possession is only accountable for what he receives and is not bound to take any particular trouble to make the most of another man's property—*Girjoji v. Keshavray*, 2 B.H.C.R. 211 (212, 213). He will not be liable for deterioration of the property arising from ordinary decay owing to the lapse of time which has caused a diminution of the annual value—*Richards v. Morgan*, 4 Y & C. 510. A mortgagee ought not to be charged exactly with the same degree of care as a man is supposed to take who keeps possession of his own property. But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is a trustee for the mortgagor to that extent, so that he ought to be made responsible for that deterioration during the time of his possession. It is not necessary to go the length of shewing fraud in the mortgagee; gross negligence is sufficient—*Wragg v. Denham*, (1836) 2 Y. & C. Ex. R. 117 (at pp. 121, 122). The mortgagee is responsible for waste, for the consequence of wilful default, and for all loss resulting from negligence amounting to breach of trust—*Girjoji v. Keshavray*, 2 B.H.C.R. 211. If he is shown to be negligent, he will be accountable not only for what he has received, but for what he might or ought to have received but for his wilful default—*Chaplin v. Young*, 33 Beav. 330; *Parkinson v. Hanbury*, L.R. 2 H.L. 1. He is not bound to engage in and will not be allowed for, speculation and adventure in respect of the property—*Hughes v. Williams*, 12 Ves. 493 (496). Thus, in the case of open mines, the mortgagee has undoubtedly the right to work them but he cannot be called upon to speculate by making a large outlay, however likely it may be that the mines will be improved by the expenditure; for the mortgagee cannot be required to incur hazard in an adventure or to risk his fortune in a speculation the benefit of which must ultimately be reaped by the mortgagor. And in no case is he bound to spend more than a prudent owner would do—*Rowe v. Wood*, (1822) 2 J. & W. 553.

466. Clause (b):—Collection of rents and profits:—A mortgagee who takes possession of the mortgaged property must be diligent in collecting the rents and profits. But the mere fact that he failed to get the highest possible rent does not necessarily show want of prudence on his part. He is liable only for wilful default—*Ram Pratap v. Sher Ali*, 3 N.L.R. 106 (following *Hughes v. Williams*, 12 Ves. 493.) The mortgagor ought not to expect that the mortgagee will show the same profits which the property yielded in preceding years when it was under his own management. The mortgagee is not an assurer of the continuation of the same rate of profits which his mortgagor was able to raise. Much depends in India on personal qualities. The very change of management and possession may cause a falling off of profits. The mortgagee in possession is not therefore liable for the actual profits of the land, but for only so much of it as he had actually cultivated, unless it be proved that but for his gross mismanagement or fraud he might have received more. Therefore, an estimate of a preceding rental does not suffice to show actual receipts—*Shah Makhan Lal v. Shri Kishen Singh*, 12 M.I.A. 157 (193). The mortgagee is not responsible for the total recorded rental of the property, but only for such sums as were actually received by him or on his behalf and for such sums, if any, as might have been received by him but for his own neglect or fault—*Banarsi Prasad v. Ram Narain*, 25 All.

287 (P.C.); *Parkinson v. Hanbury*, (1867) L.R. 2 H.L. 1; *Gouri Nath v. Fateh Singh*, 3 O.L.J. 689, 38 I.C. 537. But the mere fact that the mortgagee in possession brought an action which proved abortive, and in consequence failed to recover rent, did not establish a case of wilful default. Thus, where a mortgagee brought a suit for rent which was afterwards withdrawn owing to a technical difficulty, the plaintiff undertaking not to bring any other action for the rent but not releasing his claim to such rent, it was held that the mortgagee could not be charged with the rent which he failed to recover—*Burke v. O'Connor*, (1855) 4 Ir. Ch. R. 418.

Where a mortgagee in possession instead of letting the property to raiyats and realising rents in the ordinary way, cultivates it himself, he is not liable to account for the whole of the profits arising to him by farming the land but only for such profits as he would have realised had he let it to a tenant, or as the mortgagor would have realised had he let it—*Raghunath v. Baraik Geereedharee*, 7 W.R. 244.

The mortgagee in possession will be liable for the gross negligence of an agent employed by him for the purpose of collecting the rents, although proper care was taken in the selection of such agent—*Jones on Mortgages*, § 1123.

467. Clause (c):—Payment of revenue:—This clause is the counterpart of clause (c) of section 65. In the absence of a contract to the contrary, the mortgagee in possession must pay revenue and other public charges in respect of the mortgaged property, and he is the person primarily responsible for payment of the same. He has no right to appropriate the income without paying the revenue—*Md. Hadi v. Parbati*, 25 O.C. 2, A.I.R. 1922 Oudh 91, 68 I.C. 549; *Kannye v. Nistarini*, 10 Cal. 443; *Kundanmal v. Kashibai*, 26 Bom. 363; *Vithal v. Sriram*, 29 Bom. 391, 7 Bom.L.R. 313. Where at the time of the execution of the mortgage, no revenue was assessed on the land, but it was subsequently assessed, the mortgagee in possession was bound to pay the revenue—*Md. Hadi v. Parbati*, (supra). If owing to the default of the mortgagee in paying the revenue, the property is sold away, the mortgagor would not lose his right of redemption—*Kalappa v. Shivayya*, 20 Bom. 492 (494); *Lakshmaya v. Appadu*, 7 Mad. 111 (112). Where on default of the mortgagee to pay the revenue, the mortgagor pays it in order to avert the forfeiture or sale of the property, he may take credit for the amount when the accounts are adjusted and sue him every year in order to force him to make regular payment—*Jaijit Rai v. Govind*, 6 All. 303; *Hari v. Sridhar*, 10 N.L.R. 9, 23 I.C. 131. If the mortgagee fails to pay the revenue and the mortgagor pays it he is entitled to be reimbursed not only for the money expended but also for the interest thereon by way of damages—*Krishan v. Ambu Kurup*, 51 M.L.J. 633, A.I.R. 1927 Mad. 59, 98 I.C. 802.

But the mortgagee is not bound, in the absence of an express contract, to pay enhanced revenue if the enhancement is made subsequently to his mortgage. Such enhancement must be paid by the mortgagor—*Krishniah v. Arrappulli*, 14 M.L.J. 488; *Panigatan v. Raman Nair*, 17 M.L.J. 517; *Thippa v. Krishnaswami*, 9 M.L.T. 206, 8 I.C. 845; *Panambatta v. Kalathipodkil*, 16 M.L.T. 317, 25 I.C. 641; *Hari v. Sridhar*, 10 N.L.R. 9. (But see contra—*Tuppan Numbudri v. Chinna Pari Kutti*, 18 M.L.J. 31; *Nathurath v. Kolli Vallapil*, 22 M.L.J. 151, 12 I.C. 140; *Nanu Nair v. Ashta Moorthi*, 29 M.L.J. 772, 29 I.C. 386; *Chempathoor Raman v.*

Nagalaseri, 24 I.C. 870; *Kolli Valapil v. Natuwath*, 14 I.C. 590). Thus, where there was nothing in the mortgage-deed to show that the terms as to the amount to be paid by the mortgagee had reference to any other than the revenue under the settlement *in force at the time* of the mortgage, it would be reasonable to hold that all that the mortgagee undertook to pay was the revenue payable under such settlement, and the ultimate responsibility in respect of any addition to the land revenue must devolve on the mortgagor—*Krishnier v. Arrapulli*, 14 M.L.J. 488.

The mortgagee is bound to pay the revenue under this clause, if he is able to pay it “out of the income of the property” in his hands—*Panigatan v. Raman Nair*, 17 M.L.J. 517. If it cannot be paid out of the income, he is certainly not bound to pay it; but if he does pay it out of his own pocket, he can add the money so paid to the amount of the mortgage-money under sec. 72—*Farzand Ali v. Kaniz Fatima*, 22 O.C. 270, 54 I.C. 264. So also, in case of enhanced revenue, if the mortgagee pays it out of his own funds, he will be entitled to tack the amount to his mortgage-money—*Kamayya v. Devapa*, 22 Bom. 440; *Bohra Thakur Das v. Collector*, 28 All. 593. Even prior to the passing of the Transfer of Property Act, the mortgagee in possession was bound to pay, *out of the usufruct*, the revenue (including enhanced revenue) and other public charges, as part of his duty to manage the property with ordinary prudence, and he was not entitled to charge such payments against his mortgagor in the accounts—*Abid Husain v. Kaniz Fatima*, 46 All. 269 (273) (P.C.), 80 I.C. 1019, A.I.R. 1924 P.C. 102.

This clause does not apply where there is an express *contract to the contrary*, e.g., where the deed of mortgage distinctly provides that the Government revenue shall be paid by the mortgagor. In such a case the mortgagee will not be bound to pay the revenue, and if the property is sold on account of the revenue falling into arrears, the sale cannot be set aside—*Ooppath Naramparambath v. Koya Kutti*, 29 I.C. 344. So also in the case of enhanced revenue, although the decisions are not consistent as to which party is liable to pay it in the absence of any express contract (see *supra*), there can be no question that if the mortgagor expressly undertook the liability to pay the enhanced revenue, he must pay it, and cannot at the time of redemption claim the difference between the original and the enhanced rate that he had to pay—*Akbar Khan v. Kale Bhan*, 39 I.C. 437 (Oudh).

‘Other public charges’:—For instance, the mortgagee is bound to pay *tagavi* claims, for non-payment of which the property is liable to be sold away—*Chitta Bhula v. Bai Jamni*, 40 Bom. 483. The irrigation and other cesses charged upon the land are part of the land revenue and are therefore ‘public charges’—*Gunnam Dorayya v. Vadapillari*, 27 M.L.J. 295, 25 I.C. 797.

Rent:—The words “and all rent” have been newly added. “In clause (c) of section 76 it is provided that the mortgagee in possession shall be liable for the payment of Government revenue, other public charges and arrears of rent. If the mortgaged property is leasehold, it is also his duty to pay any rent which may become due during the period of the lease. We propose, therefore, to insert in clause (c) the words ‘and all rent’ after the words ‘charges of a public nature.’”—*Report of the Special Committee*.

Arrears of rent:—The mortgagee is bound to pay arrears or rent

even though they were for a period prior to the execution of the mortgage—*Kshetra Nath v. Durgapada*, 52 I.C. 902 (Cal.). The mortgagee is bound to pay arrears of rent which fall due in respect of the mortgaged property, but he is not bound to pay arrears of rent which accumulate in respect of that portion of the holding which is not mortgaged to him—*Ram Dulare v. Sahdeo*, A.I.R. 1925 All. 189, 83 I.C. 188.

468. Clause (d):—Repairs:—Under this clause, the mortgagee is bound to make necessary repairs of the property, out of the balance of profits left after satisfying the charges mentioned in clause (c) and deducting the interest of the principal money. His duty to make the repairs lies to the extent of the surplus rents and profits in his hands—*Richards v. Morgan*, (1753) 4 Y. & C. 570 Appx. It is a paramount duty of the mortgagee to make the necessary repairs out of the surplus profits, and the Court will not accept the excuse that to do so would diminish his interest or profits—*Shiva Devi v. Jaru*, 15 Mad. 290 (291). If he fails to make the necessary repairs, the amount of the loss caused to the mortgagor by such non-repair is an item which must be considered in determining the accounts in settlement of the mortgage at the time of redemption—*Shiva Devi v. Jaru*, supra. The duty of the mortgagee to make repairs arises only if he is in actual possession of the property; therefore where the mortgagee instead of taking possession leased the property to the mortgagor, held that not having been in possession he was not liable for damages for neglecting to keep the house in repair—*Baquar Ali v. Nisar Husain*, 1885 A.W.N. 262.

But the mortgagee is bound to make such necessary repairs as he can pay for out of the rents and profits. Especially, where the mortgage-deed places the duty of doing the repairs on the mortgagor, the mortgagee is not entitled to spend money on repairs out of his own pocket, and add the amount to the mortgage-money—*Kallu v. Ganesh*, 116 I.C. 747, A.I.R. 1929 All. 348.

469. Clause (e):—Act destructive or injurious to the property:—The rule in this clause may be compared with sec. 66, in which a similar obligation is laid on the mortgagor in possession.

The mortgagee is prevented by this clause from doing any act likely to destroy or injure the property. Thus, he cannot cut down any trees which already existed on the property when it was mortgaged; but the removal of trees planted by the mortgagee himself is not an act destructive or permanently injurious to the property—*Ramchandra v. Shripati*, 50 Bom. 692, A.I.R. 1926 Bom. 595 (596), 99 I.C. 400; *Krishna v. Srinivasa*, 20 Mad. 124 (127, 128). If the land is not agricultural land, it cannot be said that the utility of the land has been injured by the tree-roots or stumps remaining on the land after the removal of the trees planted by the mortgagee—*Ramchandra v. Shripati*, (supra). The mortgagee's act of cutting bamboo-clumps planted by the mortgagor amounts to waste, unless the bamboos were of a mature age and ripe for cutting. The cutting of bamboo of a particular class may amount to sayer produce like the cutting of jungle, and does not constitute an act of waste—*Mahabir v. Sheoshankar*, 112 I.C. 434, A.I.R. 1929 Oudh 124. But while the mortgagee is forbidden to commit ruinous acts, he is not liable for the losses caused by accident or *vis major*, e.g., loss of the mortgaged premises by accidental fire. In such cases, the mortgagee is not only not liable for the loss, but is, on the other hand, entitled to get an

additional security from the mortgagor and in default to recover the mortgage money (sec. 68)—*Venkateswara v. Kesava Chetti*, 2 Mad. 187.

Where two houses were divided by a partition-wall and there was a communication-door between the two houses, and the owner mortgaged them to two different persons after closing the door, *held* that neither of the two mortgagees could re-open it, and that if one attempted to open it, the other could restrain him from doing so. An act like the opening of this door materially altered the condition of the property, and unless it could be clearly shown to be an improvement, it was *destructive of the property* within the meaning of this clause. For if the door of communication was left open by one party, the house was of no use to the other—*Lachmi Narain v. Jethu Mal*, 16 All. 386 (387).

A mortgagee in possession as such has no right to create tenancies, permanent or otherwise, and whatever tenures are created by him during his possession would *ipso facto* come to an end when the mortgage is redeemed—*Ram Chand v. Raj Hans*, 3 A.L.J. 517.

470. Clause (f):—Insurance:—Section 72 gives the mortgagee power to insure the property, and if he so insures, this clause directs him to apply any money which he actually receives under the policy in case of loss or damage of the property, either in re-instating the property, or, according to the wish of the mortgagor, in reduction or discharge of the money.

“Under section 72, the mortgagee can insure the mortgaged premises for an amount not exceeding two-thirds of the money which would be required to restore the property in case of total destruction. But clause (f) of section 76 requires the mortgagee to apply any money which he may receive on a policy of insurance in re-instating the property, and if he fails to do so, he may be debited with such loss as may be sustained by the mortgagor. But how the mortgagee can be expected to discharge this duty when he receives two-thirds only of the value of the property, is a puzzle for which I do not pretend to be able to give you any solution. The fact that a similar provision is found in the English Conveyancing Act, from which this section is borrowed almost word for word, may account for its finding a place in the Indian Act, but cannot help us in solving the difficulty”—*Ghose's Law of Mortgage* (5th Edn.), pp. 575-576.

This clause does not apply where the insurance was made neither by the mortgagor nor by the mortgagee but by the Receiver appointed by the Court in the mortgage suit. If in such a case the property is destroyed by fire before it was brought to sale in execution of the mortgage-decree, and the Receiver obtained a large sum of money under the policy, *held* that the money received by the Receiver was not subject to the terms of the mortgage-deed, inasmuch as the insurance was kept on foot by the Court through the Receiver as a matter of protection for the benefit of all persons who were parties to the mortgage-suit, and not by the mortgagor or mortgagee in accordance with their contract in the mortgage-deed. The Court had ample discretion in directing in what manner the money so received should be laid out, and the mortgagor could not claim that it should be laid out in restoring the premises that had been destroyed or damaged by fire.—*Seth Dooly Chand v. Rameswar Singh*, 40 I.C. 623 (Cal.)

471. Clause (g):—Accounts:—A mortgagee is *bound* to give an account of the profits realised by him from the mortgaged property so

long as it was in his possession, though the mortgage be not a usufructuary one, and whether the possession was taken with or without the consent of the mortgagor—*Nilkant v. Jeenooddeen*, 7 W.R. 30. The mortgagee cannot contract himself out of the statutory liability to keep accounts (note that this clause does not contain any such words as “in the absence of a contract to the contrary,”). It is only under the circumstances mentioned in sec. 77 that the duty can be dispensed with—*Lal Bahadur v. Murlidhar*, 27 O.C. 250, 74 I.C. 95, A.I.R. 1924 Oudh 92 (94). Where a mortgage-deed providing for interest is silent as to possession, and the mortgagee takes possession of the mortgaged property, he is accountable for the rents and profits received—*Madari v. Baldeo Prosad*, 27 All. 351 (F.B.). The mortgagee is none the less bound to keep accounts because he holds possession also as lessee—*Hunooman Pershad v. Babooee*, 6 M.I.A. 393 (422). If the mortgagee refuses or neglects to deliver in the accounts, the Court must take the best evidence available and decide upon it. The general presumption will no doubt be against the mortgagee, but this would not justify the Court in accepting without examination any evidence which may be offered by the mortgagor—*Ghose's Law of Mortgage*, 5th Edn., p. 598; *Muhammed v. Uttamchand*, 63 I.C. 598 (600); *Allah Yar v. Thakur Das*, 24 P.L.R. 1918, 44 I.C. 9; *Gholam Nuzuf v. Emanum*, 9 W.R. 275.

A suit merely for accounts cannot be maintained by the mortgagor unless he asks for redemption also—*Hari v. Lakshman*, 5 Bom. 614. If the same mortgagee holds two separate mortgages from the same person, the latter has a right to obtain separate accounts of the two mortgages, although the two accounts may have been included in one suit—*Ram Chandra v. Janardan*, 14 Bom. 19.

The mortgagee is under a statutory liability to keep clear, full and accurate accounts. Accounts to be full must be detailed and supported by vouchers. If he does not render accounts or keep them, the Courts will make every presumption against him. The accounts to be kept by the mortgagee are independent of those which may be kept by a third person, as for example, the patwari, and cannot be dispensed with on the ground that the latter was keeping them—*Kuddi Lal v. Aisha*, 2 Luck. 564, A.I.R. 1927 Oudh 199 (201, 202), 102 I.C. 263; *Lakshmi Narain v. Mohamdi*, 7 Luck. 454, 137 I.C. 102, A.I.R. 1932 Oudh 123 (133). The mortgagee is liable to the mortgagor for any sum realised by him out of the mortgaged property. The fact that the realisations were unauthorised or unlawful does not qualify his liability in this matter. If the mortgagee in possession does not keep accounts or does not produce the accounts in a suit for redemption, the Court will make every presumption against him. The Court will calculate the amount due under the mortgage on the basis of gross rentals, on the hypothesis that all the tenants had paid their rents—*Lakshmi Narain v. Mohamdi*, supra; *Said Ahmad v. Raja Barkhandi*, 8 Luck. 40, 139 I.C. 64, A.I.R. 1932 Oudh 255. If the mortgagee does not keep any accounts nor file them in Court, his claim for interest must be disallowed—*Rai Shadi Lal v. Lal Bahadur*, 1933 A.L.J. 339 (P.C.), 37 C.W.N. 420 (423), A.I.R. 1933 P.C. 85. The mortgagee's accounts must be prepared by himself or by his own agent, and must comprise the gross receipts realised from the tenantry, and not merely what actually reaches the mortgagee's hands. These accounts must be full and complete, and not mere abstracts of the receipts during the period of the

mortgagee's possession. An account professing to show the demand and collections from the tenantry for any one year should be supported by detailed account showing each item of collection from every individual mentioned in the total sheet. It is not a sufficient reason for the non-production of the accounts required by law for the defendants to say that, under their peculiar circumstances, they could not keep them—*Ram Kissen v. Sha Kundan Lal*, W.R. (1864) 177.

Before accepting or rejecting the accounts in suits between the mortgagor and the mortgagee, it is usually necessary to examine them critically. When an account is presented, the Judge, on whom rests the responsibility of coming to a true decision, must examine it, and before arriving at a conclusion as to whether it is such an account as a prudent man ought to accept, he must consider the details and ascertain whether it has been kept on principles which indicate that it is probably correct—*Kundan Mal v. Kashibai*, 26 Bom. 363 (371). Before having recourse to an estimate or average not based on actual figures, the Judge must apply his mind carefully to the account which purports to be the account of actual receipts and disbursements and determine on its inherent appearance of accuracy and probability and any other evidence that may be available whether it is an account which most probably represents correctly what has actually occurred—*Ibid* (at p. 370). Where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the notice of the Court before it can be called upon to order the accounts to be reopened from the first—*Boo Jinathoo v. Shah Nagar*, 11 Bom. 78 (following *Williams v. Barbour*, L.R. 9 Ch. D. 529).

472. Clause (h):—Under this clause the mortgagee is bound to apply the rents and profits, after deducting the expenses herein mentioned, in discharge of the interest, and in reduction of the principal money if possible. The rule has been thus stated: "The gross receipts, whether they arise from the rents or from accidental payments, are ascertained at the end of each year, and after deducting the necessary outlay on account of revenue, expenses of collection and preservation of the estate, the balance goes to reduce, either in whole or in part, the interest, and if there is a surplus over, it goes to the reduction of the principal money, the account being closed at the end of each year"—*Ghose's Law of Mortgage*, 5th Edn., p. 594; *Muhammad v. Uttam Chand*, 63 I.C. 598 (Lah.); *Jaijit Rai v. Gobind*, 6 All. 303. If the mortgage-debt is fully paid off out of the usufruct, and the mortgagee thereafter continues to remain in possession and to receive the profits, he is said to avail himself of another man's money for his own use and benefit, and ought to be charged with interest from the time at which the mortgage-debt was satisfied—*Bhayalal v. Mahomed Hakim*, 57 I.C. 294 (Nag.). The Allahabad High Court holds that no interest is payable on the surplus money found with the mortgagee after the satisfaction of the mortgage, till the date of the institution of the suit for redemption. But after the institution of the suit such interest is payable by the mortgagee. The institution of the suit is really a notice to the mortgagee calling upon him to hand over the surplus money. From that date the mortgagor will be entitled to interest—*Ismail Hasan v. Mehdi Hasan*, 46 All. 897 (902), 80 I.C. 63, A.I.R. 1924 All. 881.

The mortgagees will be debited not only with the profits actually

received by them, but also with the profits which they could have realised but for negligence and carelessness. Even though there is a stipulation in the mortgage-deed that if the profits of the mortgaged property be found to be insufficient to cover the interest, the mortgagor shall pay the deficiency, such stipulation can apply only to the case where the profits of the property have decreased and not to the case where the mortgagees owing to their own default have failed to realise the profits—*Ratan Dei v. Sher Singh*, 1929 A.L.J. 217, A.I.R. 1929 All. 260 (263), 114 I.C. 876.

Occupation rent:—An alternative mode of charging the mortgagee in actual occupation is to charge him with an occupation rent, and that is more suitable in the case of buildings, whether places of residence or trade premises. It is only when he is actually in possession, or at least by his servants or agent, that occupation rent is charged—*Shepard v. Jones*, 21 Ch. D. 475. In the case of *buildings* in the possession of the mortgagee, personally occupied by him for the purpose of residence or carrying on trade, he might be charged with a fair occupation rent; and in the case of *lands* personally occupied or cultivated by him, he might be charged either in that way or with the actual net profits realised by him in using the land—*per Westropp C. J. in Prabhakar v. Pandurang*, 12 B.H.C.R. 88. But there can be no question of occupation rent if the mortgagee does not occupy the premises but lets them out to tenants—*Kishun Lal v. Hira Lal*, 10 P.L.T. 487, A.I.R. 1929 Pat. 571 (573), 120 I.C. 768. Where a mortgagee in possession actually cultivates the mortgaged land or part of it, he should be charged the net profits of his cultivation and not occupation rent—*Dadnu v. Somnath*, 6 N.L.R. 109, 7 I.C. 547 (549).

Expenses for management, collection, etc.:—The italicised words providing for expenses incurred for management and collection of rents and profits have been newly added. These words formerly occurred in clause (a) of sec. 72, and the expenses could be made an additional charge on the property; under the present section this is not allowed, but the mortgagee is simply permitted to deduct these expenses in the account of his receipts. The reasons have been thus stated:—

“In section 72, we have proposed the omission of clause (a) which relates to a right of a mortgagee to spend money for the management of the mortgaged property and the collection of rents and profits. In our opinion the inclusion of the clause in that section was not appropriate, particularly as money spent for the purposes mentioned therein is to be added to the principal. We do not think that money spent for management of the property or the collection of rents and profits should be treated as an accretion to the principal. In our opinion, as in the case of payments mentioned in clauses (c) and (d) of section 76, money spent for management or the collection of rents and profits should be treated as outgoings (*See Ghose on Mortgage*, Vol. II, p. 805, 4th Edn.). In England, such expenses are treated as ‘just allowances’ (*see Seton on Decrees*, Vol. III, p. 1976). We, therefore, propose to provide in clause (h) of section 76 that the expenses of management and collection of rents and profits should be deducted out of the receipts of the mortgagee in possession along with other outgoings mentioned therein. We thereby also give effect to the right of a mortgagee in possession to incur such expenses. A right to recover such money accrues to him only in making deductions from the receipts, while taking accounts under clause (h).”
—*Report of the Special Committee.*

The mortgagee can charge only the expenses *incurred* by him in the management of his estate. Consequently he cannot charge for personal services—*Mahadev v. Rama Chandra*, 6 Bom.L.R. 590. But he is not debarred from employing an agent to manage the estate and from charging for his salary—*Heera Singh v. Sahoo Lachman Das*, (1858) 1 N.W.P.S.D.A. 447. But if the manager is his own son, he cannot charge for his salary unless the son resides at a distance from his father, in which case his cost of maintenance will be debited against the mortgagor—*Kadir Moidin v. Nepean*, 26 Cal. 1 (P.C.). Usually, collection charges are allowed at 10 per cent. on the gross receipts—*Grish Chunder v. Shoshi Shikereshwar*, 27 Cal. 951 (P.C.). Again, if the mortgagee has to sue tenants or others for recovery of rent, for injunction against waste, for trespass or the like, he is entitled to charge for the cost of litigation—*Sounders v. Rao Khooman Singh*, (1853) N.W.P.S.D.A. 692; *Basant Singh v. Mata Baksh*, 17 O.C. 47, 23 I.C. 456. In Madras, however, it has been held that the mortgagor is not responsible for any expenses of litigation incurred by the mortgagee in recovering rents from tenants put into possession by the mortgagee himself, and the fact that the mortgagor is himself the tenant under the mortgagee can make no difference in principle—*Pokree Saheb v. Pokree Beary*, 21 Mad. 32.

The words “on the mortgage-money” have been omitted from this clause for the following reason:—

“The words ‘on the mortgage-money’ after the words ‘on account of interest’ in clause (h) are ambiguous. As defined in section 58, the word ‘mortgage-money’ includes both principal and interest. Where the mortgage-deed provides for the payment of simple interest only, the word ‘mortgage-money’ in this clause might indicate compound interest. In our opinion the words ‘on the mortgage-money’ should be omitted. The word ‘interest’ by itself is sufficient to show that according to the terms of a particular mortgage-deed it will be calculated as simple or compound as the case may be.”—*Report of the Special Committee*.

473. Effect of tender or deposit—Account for ‘gross’ receipts:—
The word “gross” has now been omitted for the following reasons:—

“In clause (i), the words ‘gross receipts’ are used. This phrase was quite appropriate with regard to the fact that no provision was made in clause (h) for deducting expenses incurred for the management of the property or the collection of the rents and profits. Now that this provision has been made in clause (h), it is unnecessary to retain the word ‘gross’ in clause (i). The same has been accordingly omitted.”—*Report of the Special Committee*. Moreover, the addition of the italicised words at the end of this clause renders the word superfluous.

Before this amendment, there was a divergence of opinion as to whether the mortgagee was entitled to deduct the collection charges and other expenses after the mortgagor tendered or deposited the mortgage-money. The Allahabad High Court was of opinion that the mortgagee was liable to account for the gross receipts from the date of the deposit, and was not entitled to any deduction on account of collection charges, even though there was an interval of several years between the date of the deposit and the date of institution of the redemption suit—*Beni Prosad v. Narain*, 5 I.C. 529 (531). The Madras High Court, on the other hand, held that a mortgagee remaining in possession after a lawful tender or deposit was no doubt liable to account for gross receipts from the mortgaged property,

but he would be entitled to all due allowances such as for payment of Government revenue, collection charges and necessary repairs of the property, subsequent to the tender or deposit, though he might not be entitled to the benefits of the special stipulations in the mortgage-deed. The words "notwithstanding the provisions in the other clauses of this section" have been used in clause (i) out of abundant caution, and are not intended to mean that the mortgagee remaining in possession after a valid tender or deposit was not to be repaid the expenses which he had justly incurred in performing the duties under clauses (a), (c) and (d). The mortgagee was not a person of worse position than a trespasser—*Subba Rao v. Sarvarayudu*, 47 Mad. 7 (26, 27), A.I.R. 1923 Mad. 533, 44 M.L.J. 534, 72 I.C. 292.

To avoid this conflict of opinion, the italicised words have been added at the end of this clause, adopting the Allahabad view. The *Special Committee remarks*:—

"In spite of the provisions in clause (i) that after the tender or deposit by the mortgagor, the mortgagee must account for his receipts or gross realisations, it has been held in I.L.R. 47 Mad. 7, that it was open to a mortgagee to deduct any sum which he may have properly incurred in respect of the mortgaged property even after such tender or deposit. In our opinion, this view is not correct. After the amount due in respect of the mortgage has been properly tendered or deposited in Court, it should not be open to a mortgagee to add any sum to the mortgage-money. We, therefore, propose to provide in clause (i) that a mortgagee shall not be entitled to deduct any amount from the receipts on account of any expenses incurred after the date of the tender or deposit."

The question whether the mortgagor is entitled to claim any interest on the profits received by the mortgagee after the date of deposit has been answered by the Allahabad High Court in the affirmative (*Beni Prasad v. Narain*, 5 I.C. 529), and by the Madras High Court in the negative (*Subba Rao v. Sarvarayudu*, 47 Mad. 7 at p. 29).

474. Mortgagee liable for loss:—The last para makes the mortgagee liable for loss occasioned by failure on his part to perform any of the duties imposed upon him by this section. If a portion of the mortgaged property is lost owing to some default on his part, and he is therefore unable to put the mortgagor in possession of that portion, at the time of redemption, the mortgagee will be debited with the value of the land in taking the mortgage-accounts—*Gopala Menon v. Narayana*, 5 L.W. 339, 40 I.C. 70.

The last para enables the mortgagor to set off any loss suffered by him owing to the mortgagee's default, in the *same suit*; a separate suit for such account is not necessary—*Shiva Devi v. Jaru*, 15 Mad. 290 (291). The question must be dealt with in the suit itself and must not be left to be determined in execution—*Gopala Menon v. Narayana*, *supra*.

The last para. provides with only a *cumulative* remedy and is not intended to operate as a bar to any other remedy which the mortgagor may have under the law—*Siva Chidambara v. Kamatchi*, 33 Mad. 71 (73). Thus, where the mortgaged property has been sold away owing to the mortgagee's default in payment of arrears of revenue, the mortgagor may either, at the time of passing of the decree for redemption, ask that the mortgagee be debited with the loss, under the last para of sec. 76, or he may bring a *separate* suit for compensation for loss of the land—

Siva Chidambara v. Kamatchi, supra. So also, where the mortgagee causes loss to the mortgaged property in his possession by cutting away certain trees, the mortgagor can recover damages from him by a separate suit, and need not necessarily debit the mortgagee with the loss when taking accounts at the time of redemption. The word 'may' in the last para of this section has not the force of 'must'—*Mahabir v. Sheo Shankar*, A.I.R. 1929 Oudh 124 (125), 112 I.C. 434.

77. Nothing in section 76, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Receipts in lieu of interest.

475. Scope of section:—This section provides that clauses (b), (d), (g) and (h) of sec. 76 shall not apply to cases where by the contract between the parties the mortgagees are to take the receipts from the mortgaged property towards interest. But if the mortgagor deposited the money in Court under sec. 83, it was held in a Madras case that the covenant between the parties ceased to be in force, and the above clauses of sec. 76 became applicable to the mortgagees—*Subba Rao v. Sarvarayudu*, 47 Mad. 7 (27). But this is no longer good law. See Note 473 under sec. 76.

Where the terms of the usufructuary mortgage were that the mortgagees were to receive the profits in lieu of interest, to pay to the mortgagors nothing but *malikana* and that they were not accountable to the mortgagors otherwise, *held* that the mortgagees were not bound to account to the mortgagors and that the mortgagors were entitled to redemption on payment of the principal money after deducting the *malikana* for the years for which it was not paid by the mortgagees—*Behari Lal v. Siblal*, 46 All. 633, A.I.R. 1924 All. 591, 82 I.C. 25. Where a *katkobala* provided that the lands were to be kept in *kat* for 9 years, that during the time the mortgagees will be entitled, on paying the rent to the landlord, to appropriate the profits in lieu of the annual rent payable, and that on the expiry of 9 years the mortgagor would redeem the *katkobala* after paying the entire amount due for principal and interest, it was held that the plaintiff could redeem only upon payment of the principal and interest, and he was not entitled to an accounts of the rents and profits received by the mortgagees from the land—*Osman Ali v. Faijian*, 53 C.L.J. 380, 134 I.C. 95. Where under the terms of a usufructuary mortgage, the mortgagee after meeting certain specified expenses was to appropriate the balance towards interest, and no rate of interest was fixed, *held* in a suit for redemption that there was no liability on the mortgagee to account nor on the mortgagor to pay interest—*Sitla Sahai v. Dhum Sing*, 28 O.C. 110, A.I.R. 1925 Oudh 114, 82 I.C. 406. So also, where it was stipulated that after deducting the Government revenue, the village expenses and the pay of servants (which was a fixed sum settled and agreed upon), the mortgagee should appropriate the surplus profits towards interest, the mortgagors having no claim for profits and the mortgagee having no claim for interest, the Privy Council held that the stipulation fell within this section and the mortgagee was not

bound to account for the rents and profits—*Bachchu Lal v. Syed Moham-mad*, 10 O.W.N. 299 (P.C.), 37 C.W.N. 457 (464), 144 I.C. 1025. A usufructuary mortgage-deed provided that the mortgagee would be entitled to appropriate in lieu of interest the profits remaining after payment of the Government revenue and malikana to the malikanadars, and that all profits from increased income should go to the mortgagee, and the mortgagor would have no concern with them. The mortgagee made profits by not paying malikana to the malikanadars. *Held* that by virtue of this section the mortgagee was not liable for any account; but the mortgagor could claim that he should be indemnified by the mortgagee against the contingency that a valid claim for arrears of malikana might be made against him by the malikanadars—*Raghubar v. Mohit Narayan*, 7 Pat. 44, 114 I.C. 473, A.I.R. 1929 Pat. 37 (39). Where it was stipulated in a usufructuary mortgage that the profits of the property should be taken in lieu of a *portion* of the interest, *held* that this section did not apply and the mortgagee was liable to account to the mortgagor and give credit for the surplus amount if any—*Mahomed Ishaq v. Rup Narain*, 54 All. 205 (F.B.), 1931 A.L.J. 977, A.I.R. 1931 All. 562, overruling *Shafi-un-nessa v. Fazalrab*, 7 A.L.R. 787, 7 I.C. 293 (294).

In the last mentioned case (7 A.L.J. 787) it was remarked that in the absence of an express stipulation therefor, a usufructuary mortgagee is exempted by sec. 77 from rendering accounts to the mortgagor. This view is not correct. It is just the contrary to what is stated in sec. 77. This section lays down that a mortgagee in possession is exempted from liability to render accounts under sec. 76 (h) if there is an express contract that the profits shall be taken in lieu of interest, etc. In other words, every mortgagee in possession, whether usufructuary or otherwise, is bound to account to the mortgagor, under sec. 76 (h) as to the profits of the mortgaged property, unless he establishes a contract in terms of sec. 77 which takes the case out of sec. 76 (h)—*Kishun Lal v. Hira Lal*, 10 P.L.T. 487, A.I.R. 1929 Pat. 571 (573), 120 I.C. 768; *Mahomed Ishaq v. Rup Narain*, *supra*.

It should be noted that in spite of an express declaration by the mortgagor that the receipts of the property shall be taken in lieu of interest or partly in lieu of interest and partly in lieu of defined portions of the principal, the Courts are unwilling to exonerate the mortgagee from the liability to account under sec. 76 (g). See *Mahtab v. Collector*, 5 All. 419; *Tippayya v. Venkata*, 6 Mad. 74; *Surendra v. Khitindra*, 29 C.L.J. 434, 53 I.C. 59. If the parties merely make an estimate of the amount of rents and profits that would be available for reduction of the debt, the mortgagee is not exempted from liability to account—*Surendra v. Khitindra*, *supra*.

Priority.

78. Where through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Postponement of prior mortgagee.

476. Principle:—The rule as to priority of mortgages is stated in the equitable maxim *qui prior est tempore potior est jure* (he who is prior

in time is stronger in law) enunciated in sec. 48. *Prima facie*, and apart from notice, the priority of mortgages in India depends upon the respective dates of their creation, the earlier in date having the precedence—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (23), 121 I.C. 625. This section is an exception to the above principle; it lays down that the Court would postpone the prior legal estate to the subsequent equitable estate where the owner of the legal estate had assisted in or connived at the fraud which had led to the creation of a subsequent equitable estate without notice of the prior legal estate—*Northern Counties Fire Insurance Co. v. Whipp*, 26 Ch. D. 482 (494); *Balmakun Das v. Moti Narayan*, 18 Bom. 444 (447).

This section has no application and cannot be used to defeat the rights of a person who has obtained indefeasible title to the property, as by continuous possession or prescription—*Nallamuthi v. Baitha Naickan*, 23 Mad. 37.

In order to invite the application of this section to a given case it is necessary to prove that the fraud, misrepresentation or gross neglect of the prior mortgagee was the *proximate* cause for the advance of money by the subsequent mortgagee. If the fraud, etc., of the prior mortgagee is not the proximate and primary cause but only one of the various *contributory* factors that led the subsequent mortgagee to advance money, this section can have no application—*Ratan Lal v. Mukandi*, 1933 A.L.J. 16, A.I.R. 1933 All. 299 (300), 146 I.C. 488.

477. Fraud:—Where the mortgagee had fraudulently concealed the fact from a subsequent incumbrancer that he himself made a prior advance upon the same property, he could not set up his rights as a prior mortgagee in opposition to the subsequent incumbrancer—*Bhurrut Lal v. Gopal Sarun*, 11 W.R. 286. So, where the prior mortgagee was shown to have consented to a second mortgage which contained a recital that it was free of all prior incumbrances, *held* that it amounted to an inducement to the second mortgagee to advance his money as a first charge on the security of the mortgaged property, and that therefore the prior mortgagee could not thereafter turn round and claim priority over that charge in favour of his own mortgage subsisting from an earlier date—*Raman Chetty v. Steel Brothers*, 15 C.W.N. 813 (P.C.), 11 I.C. 503, 21 M.L.J. 936; *Sakhiuddin v. Sonaullah*, 22 C.W.N. 641 (643), 45 I.C. 986. But if a prior mortgagee knowing that a second mortgage is going to be executed merely keeps quiet, he is not guilty of constructive fraud and does not lose his priority; nor does his attestation to the second mortgage amount to constructive fraud, if he is not aware of its contents—*Salamat Ali v. Budh Singh*, 1 All. 303. But if he attests the second mortgage, knowing of its contents, and keeps silent, and thereby leads the second incumbrancer to believe that the property is unencumbered, and the circumstances are such that the latter would not have advanced money on the property if he had known of the prior incumbrance, the silence will amount to constructive fraud, and the prior mortgagee will lose his priority—*Salamat v. Budh Singh*, *supra*.

Fraud does not always mean such conduct as would justify a Judge and jury in finding that there has been *actual* fraud, but such conduct as would justify the Court in concluding that there has been fraud in some artificial sense, as in a case where it is difficult to account for the duplicity and concealment of the prior mortgagee on any other supposition than

that he intended to defraud some one, but at the same time there is nothing on record to show what that fraud is or in fact whether there is any fraud in the ordinary sense of the word at all—*Nanda Lal v. Abdul Aziz*, 43 Cal. 1052 (1081, 1082), following *Walker v. Linom*, [1907]. 2 Ch. 104.

A charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it—*Abdul Hossein v. Turner*, 11 Bom. 620 (643) (P.C.) following *Montesquien v. Sandys*, 18 Ves. 302 (314). “The mere averment of fraud in *general* terms is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be a matter of account, to point out a *specific* error and establish it by evidence. Nobody can be expected to meet a case, and still less to dispose of a case summarily upon mere allegations of fraud without a definite character being given to those charges by stating the grounds upon which they rest”—*per* Lord Hatherley in *Wallingford v. Mutual Society*, 5 App. Cas. 685 (701). If a plaintiff desires to press a claim to relief against a defendant on the ground of fraud, it must be pleaded and particulars of the fraud alleged must be specifically set out—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (28), 121 I.C. 625. A person who charges another with fraud must himself prove that fraud, and the plaintiff is not relieved from this obligation because the defendant has himself told an untrue story—*Mahomed Golab v. Mahomed Sulliman*, 21 Cal. 612 (620).

478. Misrepresentation:—Under sec. 18 of the Contract Act, “Misrepresentation means and includes—(1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though he believes it to be true; (2) any breach of duty which, without an intention to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; (3) causing, however, innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.”

“If a man makes a mortgage and afterwards mortgages the same estate to another, and the first mortgagee is in combination to induce the second mortgagee to lend money, this fraud will no doubt in equity postpone his own mortgage. So, if such mortgagee stands by and sees another lending money on the same estate without giving him notice of his first mortgage, this is such a misrepresentation as will forfeit his priority”—*per* Lord Cowper in *In re Thatched House*, (*Peter v. Russell*), 1 Eq. Ca. Abr. 322.

Misrepresentation does not necessarily mean *fraudulent* misrepresentation, just as gross negligence does not mean negligence amounting to fraud—*Shan Maun Mull v. Madras Building Co.*, 15 Mad. 268 (275).

479. Gross negligence:—There is a distinction between the English and the Indian law, as regards the meaning of gross negligence. According to English law, gross negligence means negligence *amounting to fraud*; and the tendency of English decisions is to refuse to postpone the prior incumbrancer merely on the ground of gross negligence unaccompanied by any element of fraud. The Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner—*Northern Counties*

Fire Insurance Co. v. Whipp, (1884) 26 Ch. D. 482, 53 L.J. Ch. 629, 51 L.T. 806. The rule of equity is that a prior encumbrancer will not be postponed to a subsequent encumbrancer unless he has been guilty of gross negligence amounting to fraud—*per* Wood, V.C. in *Dowle v. Saunders*, 34 L.J. Eq. 87. Mere negligence is not sufficient to deprive a mortgagee of his priority; his negligence must be such as to amount to evidence of fraudulent intention, such as to lead the Court to conclude that he is an accomplice in the fraud—*per* Lord Eldon in *Evans v. Bicknell*, (1801) 6 Ves. 174 (182). There must be either direct fraud or negligence amounting to evidence of fraud to induce the Court to interfere for the purpose of postponing a party—*per* Lord Eldon in *Martinez v. Cooper*, (1826) 2 Russ. 198.

But in India the law is otherwise. It has been pointed out in a Madras case that the fact that the Legislature have used the word 'fraud' separately in the section seems to indicate an intention to make gross neglect of itself and *apart from fraud* a reason for postponement of the prior mortgagee, and if the framers of the Act had wished to limit the application of the words 'gross neglect' to cases where there was an element of fraud, they could have done so by appropriate words. The words, therefore, must not necessarily be read in the light of the English decisions—*Shan Maun Mull v. Madras Building Co.*, 15 Mad. 268 (275). So also, it has been held in a Calcutta case that this section makes fraud, misrepresentation and gross negligence quite disjunctive; one cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive. It is not necessary that there should be fraud or something indicating fraud to bring a case within the category of gross negligence—*Nanda Lal v. Abdul Aziz*, 43 Cal. 1052 (1080), 34 I.C. 115; *Cowasji v. Tyabji*, 23 S.L.R. 97, A.I.R. 1928 Sind 179 (183), 112 I.C. 722. In *Damodara v. Somasundara*, 12 Mad. 429 (431) and *Monindra Chandra v. Troylucko*, 2 C.W.N. 750 (753), the English cases were followed and gross negligence was interpreted as neglect amounting to fraudulent intention. But the ruling in *Monindra v. Troylucko*, 2 C.W.N. 750 has been disapproved of in the recent case of *Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (29), 121 I.C. 625.

In a more recent English case it has been observed that a party may be guilty of negligence, but it is not essential that he should be guilty of fraud—*Oliver v. Hinton*, [1899] 2 Ch. 264. "To deprive a purchaser for value, without notice of a prior encumbrance, of the protection of the legal estate it is not essential that he should have been guilty of *fraud*; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority"—*per* Lindley, M.R. in *Oliver v. Hinton*, *supra*. Even Fry, L.J. remarked in *Northern Counties Fire Insurance Co. v. Whipp* (*supra*), that "the expression gross negligence that amounts to evidence of a fraudulent intention is certainly embarrassing; for negligence is the not doing of something from carelessness and want of thought and attention; whereas fraudulent intention is a design to commit some fraud and leads men to do or omit doing a thing not carelessly but for a purpose."

No general definition of gross neglect has been or can be laid down. Each case must depend upon the facts proved in it and reasonable inferences from such facts—*Damodara v. Somasundara*, 12 Mad. 429 (431);

Nanda Lal v. Abdul Aziz, 43 Cal. 1052 (1083). "Gross negligence is negligence with a vituperative epithet, and cases are very difficult to deal with when you are obliged to use vituperative epithets of that sort to enunciate a principle. What constitutes gross negligence is always excessively difficult to define or by way of anticipation to illustrate"—*per* Campbell, L.J. in *Colyer v. Finch*, (1856) 5 H.L.C. 905 (924), 26 L.J. Ch. 65. Gross neglect means and involves a failure on the part of the prior mortgagee to take such reasonable precautions against the risk of a subsequent encumbrancer being deceived as in the circumstances renders it unjust that the earlier mortgage should retain its priority. Each case must turn upon its own facts, and it is undesirable even if it were practicable, that the Court should attempt to define the term with more particularity or precision. For instance, an act or omission that would amount to gross neglect on a banker or a man of business might not be so regarded in the case of an ill-educated man or a woman—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (29), 121 I.C. 625. Thus, an omission to examine the revenue-papers or to look into the entries in the *khewat* may or may not constitute gross neglect according to the facts and circumstances of the case—*Ratan Lal v. Mukandi*, 1933 A.L.J. 16, 146 I.C. 488, A.I.R. 1933 All. 299 (301).

The mere fact that a prior mortgagee who was entitled to possession did not take possession or that he omitted to record the prior mortgage-deed in the revenue papers, did not show such gross negligence on his part as to deprive him of his priority—*Mahesh v. Daulat*, 30 P.L.R. 128, A.I.R. 1929 Lah. 314, 118 I.C. 655. So also, the mere fact that the prior mortgagee did not have his mortgage registered till after the execution of the second mortgage, did not show any gross neglect on his part, if it was registered within the four months' time allowed by the Registration Act. Thus, if the prior mortgage was executed on the 20th March, and was presented for registration on 22nd June, and in the meantime a second mortgage was created on the 7th June and registered on the following day, the prior mortgage could not be postponed to the subsequent mortgage, if there is nothing to show that the prior mortgagee induced the second mortgagee to advance money—*Surendra v. Haridas*, 60 Cal. 225, A.I.R. 1933 Cal. 398 (400), 144 I.C. 196.

Where the subsequent mortgagee is himself guilty of gross negligence, he cannot burden the prior mortgagee with the consequences of his own negligence. The law does not accept the argument of negligence against negligence, like that of estoppel against estoppel—*Ratan Lal v. Mukandi*, *supra*. See also *Surendra v. Mohendra*, 59 Cal. 781, 36 C.W.N. 420 (427), 140 I.C. 662, where the second mortgagee was infinitely more negligent in not calling for an important document of the mortgagor's title than the prior mortgagee who was merely negligent in not calling for an original document of title and in being satisfied with a certified copy of it on the mortgagor's representation that the original had been lost.

This section speaks of *gross* negligence; and so, a *slight* negligence on the part of the prior mortgagee in parting with the mortgage-deed cannot be considered sufficient to deprive him of his priority—*Mutha v. Sami*, 8 Mad. 200 (202). If a prior mortgagee accepted a certified copy of a document (redemption certificate) relating to the property on the mortgagor's representation that the original had been lost, and did not call for an affidavit, this omission was not negligence, far less any *gross* negligence such as this section contemplates—*Surendra v. Mohendra*, *supra*.

480. Non-possession of title-deeds by the first mortgagee:—The question whether the first mortgagee, who omits to obtain possession of the title-deeds at the time of execution of the mortgage, or who after obtaining them parts with their possession, is guilty of gross negligence must be decided with reference to the nature and circumstances of each case. The mere possession of the title-deeds by the second mortgagee and non-possession of them by the prior mortgagee will not make the latter lose his priority over the former—*Thorpe v. Holdsworth*, 38 L.J. Ch. 194; *Hunt v. Elmes*, 2 DeG. F. & G. 578. The Court will not impute fraud or gross and wilful negligence to the prior mortgagee if he has *bona fide* inquired for the title-deeds and a reasonable excuse has been given for the non-delivery—*Hewitt v. Loosemore*, 9 Hare 449. If the prior mortgagee can satisfy the Court that the absence of title-deeds was reasonably explained to him by the mortgagor when he obtained his mortgage, or that he was subsequently induced to part with them upon such grounds and under such circumstances as to exonerate him from any serious imputation of negligence, he ought not to lose his priority because the mortgagor may have afterwards dishonestly handed over the title-deeds to a second mortgagee—*Somasundara v. Sakharai*, 4 M.H.C.R. 369. It cannot be said that a mortgagee owes a duty to all persons who in the future may become puisne mortgagees of the same property to take care that the mortgagor is not enabled to commit a fraud upon subsequent encumbrancers by being allowed to be in possession of the documents of title—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (28), 121 I.C. 625. "Title-deeds are not in the eye of the law analogous to fierce dogs or destructive elements where from the nature of the thing the Courts have implied a general duty of safe custody on the part of the person having their possession or control"—*per* Fry, L.J. in *Northern Counties Insurance Co. v. Whipp*, (1884) 26 Ch. D. 482. Thus, where after a mortgage-deed was executed and the title-deeds were handed over to the mortgagee, the mortgagor obtained the title-deeds back from the mortgagee on the representation that they were required for effecting a mutation of names in the Land Revenue Registers, and subsequently utilised them for effecting a mortgage of the same property to another, *held* that under the circumstances the conduct of the prior mortgagee did not amount to gross negligence and that he was not to be postponed to the subsequent mortgagee—*Chettiar Firm v. Chettiar Firm*, 4 Rang. 238, 98 I.C. 19, A.I.R. 1926 Rang. 195. Where the mortgagee handed over the mortgage-deed to his vendee as a security for unpaid purchase-money, and then the vendee made over the deed to the mortgagor who then sold the property, *held* that the conduct of the mortgagee did not at all amount to negligence—*Mutha v. Sami*, 8 Mad. 200 (202). Where the prior mortgagee obtained the important document of title, and omitted to obtain possession of a document in respect of a portion of the property, his conduct did not amount to gross negligence—*Chettiar Firm v. Chettiar Firm*, 7 Rang. 28, A.I.R. 1929 Rang. 65 (66), 116 I.C. 475.

Before a prior mortgagee can be postponed under this section, the Court must be satisfied that the subsequent mortgagee was induced *directly* and not remotely to advance money on the security of the property by reason of the gross neglect of the prior mortgagee. There must be *direct* connection between the gross negligence and the inducement to make the subsequent advance—*Lloyds Bank v. P. E. Guzdar & Co.*, *supra*. To cite

a familiar illustration, "in one sense every man who sells a pistol or a dagger enables an intending murderer to commit a crime; but is he, in selling a pistol or a dagger to some person who comes to buy it in his shop, acting in breach of any duty? Does he owe any duty to all the world to prevent people taking advantage of his selling pistols or daggers in his business, because he does in one sense enable a person to commit a crime?"—*per* Lord Halsbury in *Farquharson v. King*, [1902] A.C. 325, 86 L.T. 810, 71 L.J.K.B. 667. The same remarks apply to a prior mortgagee who unsuspectingly hands over the title-deeds to the mortgagor.

The burden lies on the prior mortgagee to explain the omission. If it appears that he asked for the title-deeds and received a reasonable excuse for their non-production, or that he received some of the deeds under the reasonable belief that he was receiving all, or that he parted with their possession on some reasonable representation made by the mortgagor, he ought not to lose his priority as against a subsequent incumbrancer—*Manners v. Mew*, (1885) 29 Ch. D. 725; *Oliver v. Hinton*, [1899] 2 Ch. 264.

But the Court will impute fraud or gross or wilful negligence to the mortgagee if he *omits all inquiry* as to the deeds—*Hewitt v. Loosemore*, *supra*. If it appears from the conduct of the prior mortgagee that there was no *bona fide* inquiry for the title-deeds or reasonable excuse for their non-production, the Court will certainly impute gross and wilful negligence to the prior mortgagee and will therefore postpone him to the second mortgagee. Thus, a prior mortgagee who allows the title-deeds, for nearly 4 years after his mortgage, to be in the possession of the mortgagor and gives no reasonable explanation of their being so in his possession, is guilty of gross neglect under this section—*Shan Maun Mull v. Madras Building Co.*, 15 Mad. 268 (274), affirming *Madras Building Co. v. Rowlandson*, 13 Mad. 383. Where the prior mortgagee surrendered the title-deeds to the mortgagor in order that the latter would raise loan elsewhere and repay the mortgagee, and then the mortgagor raised loan by a second mortgage but the money was not paid to the first mortgagee, *held* that the prior mortgagee parting with the title-deeds to the mortgagor for the purpose of raising money by another mortgage was guilty of gross negligence, unless he took the ordinary precautions that any person advancing money on the security of the deeds should know of his mortgage, such as sending some person with the deeds, insisting that they should be inspected in his presence, or otherwise. He would therefore lose his priority—*Madras Hindu Union Bank v. Venkatarangiah*, 12 Mad. 424 (428). G mortgaged certain title-deeds of immoveable property with the defendant Bank to secure an over-draft. Subsequent to this deposit, representing that the title-deeds were required to be shown to an intending purchaser, G obtained possession of the same and mortgaged them to the plaintiff Bank giving them to understand that the property was free from any encumbrance. On the fact of prior encumbrance being discovered, the plaintiff Bank applied for a decree on the mortgage and for prior charge. *Held* that the defendant Bank (prior mortgagee) was guilty of gross negligence in parting with the possession of the title-deeds, and lost its priority. The prudent and normal practice of the defendant Bank (who held an equitable mortgage which was not registered), when the mortgagor applied that the title-deeds might be shown to an intending purchaser, was not to allow the mortgagor to have possession of the title-

deeds, but to hand over the title-deeds to the Bank's solicitors in order that the solicitors should arrange with the solicitors of the purchaser for the examination of the documents. This would have been a prudent and safe course for a Bank to follow in Calcutta, where mortgages are created by deposit of title-deeds, and such mortgages are not usually registered. In departing from this usual and prudent course the defendant Bank was guilty of gross negligence, and consequently its mortgage must be postponed to that of the plaintiff Bank—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (25, 26), 121 I.C. 625. Where the prior mortgagee, at the request of the mortgagors returned to them the title-deeds to enable them to raise money to pay off his mortgage, and the mortgagors agreed to raise the money in five days, but after the five days the mortgagee did not take any active steps to get back the title-deeds, *held* that his conduct amounted to gross negligence, and disentitled him to claim priority over a subsequent mortgagee—*Damodara v. Somasundara*, 12 Mad. 429 (432, 433); *Cowasji & Co. v. Tyabji*, 23 S.L.R. 97, A.I.R. 1928 Sind 179 (184), 112 I.C. 722. The vendor sold a property to the vendee, but the latter being unable to pay the greater portion of the purchase-money gave a mortgage of the property to the vendor but did not deliver the title-deeds. Moreover in the sale-deed it was stated that the whole purchase money had been paid in cash. The vendee afterwards gave a second mortgage of the property by deposit of title-deeds. *Held* that the prior mortgagee (vendor) was guilty of gross negligence in not taking delivery of the title-deeds, and must therefore lose his priority. His neglect to recover the title-deeds when he had full notice that the vendee was impecunious and a bad paymaster, was gross and culpable negligence and was rendered more so by a deliberate suppression of the existence of the mortgage in the sale-deed and suggestion that the purchase-money was paid in cash—*Nanda Lal v. Abdul Aziz*, 43 Cal. 1052 (1083), 34 I.C. 115. These cases are illustrations of the well-known maxim of law: "*He who trusts most shall suffer most.*"

In some other cases it has been held that since mortgages by deposit of title-deeds cannot be effected in *moffusil* places, it is a common practice in the *mofussil* to leave the title-deeds in the possession of the mortgagor, and since the existence of a system of registration has caused mortgagees in general to attach little importance to the possession of title-deeds, the failure of the prior mortgagee to obtain possession of them should not necessarily be imputed to him as gross negligence—*Rangasami v. Annamalai*, 31 Mad. 7 (10), following *Agra Bank v. Barry*, L.R. 7 H.L. 135; *Monindra Chandra v. Troylucko*, 2 C.W.N. 750 (752, 754). See also *Balmakundas v. Moti Narayan*, 18 Bom. 444 (447).

Effect of registration of prior mortgage:—In some of the cases cited above, it was contended by the first mortgagee (who was held to be guilty of gross negligence for not having possession of title-deeds) that since his mortgage was *registered*, the subsequent mortgagee ought to have searched the registry which would have discovered the prior mortgage, and his omission in doing so amounted to negligence on *his* (subsequent mortgagee's) part, and disentitled him to get priority over the first mortgagee; but the Court held that registration did not amount to notice of the first mortgage, and the non-search of the registry was not an act of negligence on the part of the subsequent mortgagee—*Shan Maim Mull v. Madras Building Co.*, 15 Mad. 268 (278); *Madras Building Co. v.*

Rowlandson, 13 Mad. 383 (388); *Nanda Lal v. Abdul Aziz*, 43 Cal. 1052 (1084); *Chettiar Firm v. Chettiar Firm*, 4 Rang. 238, A.I.R. 1926 Rang. 195, 98 I.C. 19.

The definition of notice has now been amended, and under the new Explanation 1 added to section 3, *registration amounts to notice*. And so the Calcutta High Court has recently expressed an opinion (though by way of *obiter*) that where the prior mortgagee has surrendered the title-deeds to the mortgagor, but the prior mortgage has been *registered*, and a later prospective encumbrancer by searching the register would thus be in a position, if he made reasonable enquiry, to discover its existence, the Court would be slow to hold that the prior mortgagee had been guilty of gross neglect or that the action of the prior mortgagee in failing to retain possession of the title-deeds had in any direct way caused or induced the later encumbrancer to advance money on the security of the property—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (29), 121 I.C. 625. These remarks would, however, apply to cases of gross negligence, but not where the prior mortgagee has been guilty of *fraud* or *misrepresentation*; in such cases, he cannot evade the penalty of this section by saying that his mortgage which is registered must at all events have priority over the mortgage created in favour of a subsequent mortgagee who must be deemed to have had notice of the first mortgage by reason of its registration. Fraud or misrepresentation would certainly operate as *estoppel*.

79. If a mortgage, made to secure future advances, the performance of an engagement, or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration.

A mortgages Sultanpur to his bankers, B. & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C to secure Rs. 10,000, C having notice of the mortgage to B. & Co., and C gives notice to B. & Co., of the second mortgage. At the date of the second mortgage, the balance due to B. & Co., does not exceed Rs. 5,000. B. & Co. subsequently advanced to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B. & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

481. This is one of the few sections on mortgage that have escaped amendment. Based as it is on a dissentient judgment in an English case, one would have expected that it should be amended in the light of the majority judgment in that case, but the Legislature has left this section unaltered for the following reasons:—

“Section 79 is based on the dissenting judgment of Lord Cranworth in *Hopkinson v. Rolt* (9 H.L.C. 514). The majority of the judges held in that case that the first mortgagee should be postponed in respect of any advances made by him after notice of a subsequent incumbrance,

The principle on which the majority judgment is based is that the prior mortgagee has the option to make or refuse to make any further advance, and, although he may have agreed to do so, no specific performance of such an agreement could be obtained [(1892) 1 Ch. 271; 12 Bom. 242]. He should not, therefore, be permitted by any voluntary addition to the amount of his advance to affect the rights of the subsequent incumbrancer who acquires his security on the property as it exists. On the other hand, as pointed out by Lord Cranworth, mortgages are but contracts and, when once the rights of parties under them are defined and understood, it is impossible to say that any rule regulating their priority is unjust. His Lordship observed:—‘If the law is once laid down and understood, that a person advancing money on a second mortgage, with notice of a prior mortgage covering future as well as present debts, will be postponed to the first mortgagee, to the whole extent covered or capable of being covered by the prior security, he has nothing to complain of.’

“In their report dated 20th May, 1870, the Law Commissioners observed that the dissenting view of Lord Cranworth in *Hopkinson v. Rolt*, was more just than the view taken by the majority of the Judges. However, the majority view prevailed in England. [*West v. Williams*, (1898) 1 Ch. 488, C.A. (1899) 1 Ch. 132], but in 1924 the Property Law (Amendment) Act provided that a prior mortgagee may tack further advances to his original advance and claim priority to subsequent incumbrances in the following cases:—

- (i) if further advances are made by arrangement with subsequent mortgagees to that effect;
- (ii) if they are made without notice of the subsequent mortgages;
- (iii) if they are made in pursuance of an obligation covenanted in the prior mortgage, it being immaterial whether at that time the prior mortgagee had or had not notice of subsequent mortgages.

“These provisions are reproduced in section 94 of the Property Act, 1925. In our opinion, therefore, the section does not require amendment.”
—*Report of the Special Committee.*

Scope of the section:—This section forms an exception to the rule stated in sec. 80 (now 93), under which a mortgagee making a further advance does not in respect of that advance acquire any priority as against an intermediate mortgagee. Under this section, the intermediate mortgagee having notice of the prior mortgage is postponed so far as regards further advances which are subsequently made on the security of that mortgage, provided it expresses the maximum to be secured thereby and that maximum is not exceeded—Shephard and Brown, 7th Ed., p. 337; *Dalip Narayan v. Chait Narayan*, 16 C.L.J. 394, 17 I.C. 927; *Baij Nath Goenka v. Daleep Narayan*, 1 P.L.T. 582, 58 I.C. 489.

“*If made with notice of the prior mortgage*”:—The priority which under this section may be acquired in respect of subsequent advances depends upon the fact that the second mortgagee over whom priority is gained had notice of the prior mortgage. If he had not notice of such mortgage, then the case will be decided according to the general principle of priority enunciated in sec. 48 (*Qui prior est tempore potior est jure*). For an instance of a second mortgage taken with notice of the prior mortgage, see *Brijmohan v. Dukhan*, 9 Pat. 816, A.I.R. 1931 Pat. 33 (37), 130 I.C. 168.

“Though made with notice of the subsequent mortgage”:—Under this section, the prior mortgagee making the subsequent advances does not lose his priority in respect of such advances by reason of the fact that he did so with notice of the intermediate mortgage. In other words, the question whether the prior mortgagee had, at the time of making the further advances, notice of the second mortgage, is immaterial.

482. Maximum:—Two questions have to be considered under this section: *first*, whether the subsequent mortgagee took with notice of the prior mortgage (and consequently with notice as to the future advances); *secondly*, whether the prior mortgage expressed the maximum secured thereby. To attract the provisions of this section it is essential that a mortgage to secure future advances must express the maximum intended to be secured thereby, and if no such maximum is fixed, this section cannot apply, and the prior mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, does not acquire any priority over the intermediate mortgagee in respect of his security for such subsequent advance (see the latter part of sec. 93). And in such a case, it is immaterial whether the intermediate mortgagee had notice (actual or constructive) of the prior mortgage—*Imperial Bank of India v. U. Rai Gyaw Thu & Co., Ltd.*, 51 Cal. 86 (98) (P.C.), 1 Rang. 637, 28 C.W.N. 470, 76 I.C. 910, A.I.R. 1923 P.C. 211. It is not necessary that the mortgage bond should explicitly express the maximum amount secured, if the amount may be calculated from the recitals—*Dalip Narayan v. Chait Narayan*, 16 C.L.J. 394, 17 I.C. 927. Thus, where a deed stated that a lease had been granted for nine years upon an annual rental of Rs. 12,125 and that the lessees had hypothecated their properties to the lessors to secure the due payment of rent, *held* that the maximum amount secured could be determined by a simple arithmetical calculation, and that it was Rs. 1,09,125 (*i.e.*, Rs. 12,125×9), though it was not expressly so stated—*Dalip Narayan v. Chait Narayan*, 16 C.L.J. 401, 17 I.C. 931; *Brijmohan v. Dukhan*, 9 Pat. 816, A.I.R. 1931 Pat. 33 (36), 130 I.C. 168.

483. Future advance:—A further advance made to the mortgagor after he has parted with the equity of redemption cannot be tacked. A mortgagor cannot, after the sale of the equity of redemption in the property mortgaged by him, charge such property with a further advance so as to render the purchaser of the equity of redemption liable to pay such debt before he can redeem—*Bhagwandas v. Shamdas*, 23 All. 429. But if the conduct of the purchaser was such as to amount to a standing by and allowing the mortgagee to make further advances to the mortgagor under the supposition that the latter was still the owner of the equity of redemption, such conduct would give an equity in favour of the mortgagee. Thus, for instance, where the property was standing in the mortgagor's name in the Collector's books, and the assignee allowed it to so remain after the assignment, it would be sufficient to render him liable for the further advances—*Govindrao v. Raoji*, 12 Bom. 33 (at p. 36).

484. Charge:—This section applies to mortgages as well as to charges. A partition-deed was effected between the plaintiffs, the 2nd defendant and three other persons, brothers, which provided that “the common family debts should be discharged by the respective shares to whom they fell, as per schedule of the document, and that if any sharer failed to discharge his portion of the debt, such sharer's properties should

be liable for such debts and for the losses that might happen to the family." The second defendant not having discharged a debt due by him under the partition-deed, a decree was obtained by the creditor against all the brothers. In the meantime the second defendant had mortgaged his share to the first defendant. The plaintiffs now brought a suit for a declaration that under the terms of the partition-deed a mortgage-right had been created in their favour to the extent of the decree-amount and that right had priority over the mortgage executed by the 2nd defendant in favour of the 1st defendant after the partition. *Held* that the above provision in the partition-deed was not one which merely emphasized the personal liability of the sharer to pay his share of the family debts but created a mortgage or a charge upon the property, that the case was governed by this section, and that the plaintiffs were entitled to the declaration claimed in the suit—*Sesha Iyer v. Srinivasa Ayyar*, 41 M.L.J. 282, 70 I.C. 362, A.I.R. 1921 Mad. 459.

80. * * * * *

This section has been omitted here but re-enacted as sec. 93.

"As the principle of 'tacking' is akin to subrogation, we propose to number section 80 as section 93, so as to place it after the section which relates to subrogation."—*Report of the Special Committee.*

Marshalling and Contribution.

81. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

Marshalling securities.

81. If the owner of two *or more* properties mortgages them to one person and then mortgages one *or more* of the properties to another person, * * * the *subsequent* mortgagee is, in the absence of a contract to the contrary, entitled to have the *prior* mortgage-debt satisfied out of the property *or properties* not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the *prior* mortgagee or of any other person who has for * * consideration acquired an interest in *any of the properties*.

Marshalling securities.

Amendment:—This section has been amended by sec. 42 of the T. P. Amendment Act (XX of 1929). The words "or more" have been added (see Note 487), and consequently the words "first" and "second" mortgagee have been substituted by "prior" and "subsequent" mortgagee.

The word "valuable" has been omitted (Note 490). The most important change is the omission of the words "who has not notice of the former mortgage" (see Note 488).

486. Principle:—The principle of the doctrine of marshalling has been thus stated in an English case: "If there are two creditors who have taken securities for their respective debts, and the security of the one is confined to both and the security of the other is confined to one of those funds, the Court will arrange or marshal the assets so as to throw the person who has two funds liable to his demand on that which is not liable to the debt of the second creditor"—*Baldwin v. Belcher*, 3 Dr. & War. 173; *Aldrich v. Cooper*, 8 Ves. 382. If two properties X and Y were mortgaged to A, and afterwards X was mortgaged to B, *held* that B was entitled to have the securities marshalled, so as to throw A's mortgage in the first instance on Y—*Gibson v. Seagrim*, 20 Beav. 614. "If A has a charge on Whiteacre and Blackacre, and if B has a charge on Blackacre only, A must take payment of his charge out of Whiteacre only and must leave Blackacre, so that B, the other creditor, may follow it, and obtain payment of his debt out of it; in other words, if two estates, Whiteacre and Blackacre, are mortgaged to one person, and subsequently one of them, Blackacre, is mortgaged to another person, then unless Blackacre is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of Whiteacre, in order to leave to the second mortgagee Blackacre, upon which alone he can go."—*per* Cotton, L.J. in *Webb v. Smith*, 30 Ch. D. 192 (200). In such a case the first mortgagee has no right to exhaust a security which is the sole fund for payment of the second mortgagee—*Lawrence v. Galsworthy*, 3 Jur. (N.S.) 24. Where the subsequent mortgagees who had foreclosed a property which was included in an earlier mortgage of several other properties to the prior mortgagees, applied for an order for the exclusion of the property from the sale proceedings held in execution of the decree of the prior mortgagees, *held* that the Court had power, in appropriate circumstances, to make such order under secs. 56 and 81—*Tara Prosanna v. Nilmoni*, 41 Cal. 418 (422). The object of this section is to protect the subsequent mortgagee from the risk of the properties mortgaged to him being sold to satisfy the dues of a prior mortgagee who has the additional security of some other properties also—*Rajkeshwar v. Md. Khalilul Rahman*, 3 Pat. 522 (530), A.I.R. 1924 Pat. 459, 78 I.C. 796.

487. Scope of section:—The old section spoke of "two properties" only. This has now been substituted by "two or more" properties. The reason is thus stated:—

"Section 81 deals with the marshalling of securities. It appears from the proceedings underlying Act IV of 1882 that the section is based on the following passage in Fisher on Mortgage (Art. 1356, p. 694, 6th Edition):—

'If the owner of two estates mortgaged them both to one person, and then one of them to another, without notice, the second mortgagee may insist, under the doctrine of marshalling, but without interfering with the rights of the former, that the debt of the first shall be satisfied out of the estate not mortgaged to the second, so far as that shall extend.'

Like section 56 this section provides for marshalling when there are two properties only. It is also restricted to a case when the second mortgagee

intends to marshal the securities. It does not provide for the case of more than two properties nor for the case where the property has been mortgaged more than twice and a mortgagee subsequent to the second mortgagee desires to marshal the prior securities. We propose to widen the scope of the section by providing that it should apply to cases where there are more than two properties and to all subsequent mortgagees generally.”—*Report of the Special Committee.*

The benefit of this section can be claimed not only by the subsequent mortgagee but also by a purchaser of the property in execution of the mortgage decree obtained by the subsequent mortgagee (whether that purchaser be a third person or the subsequent mortgagee himself)—*Rajkeshwar v. Md. Khalilul Rahman*, 3 Pat. 522 (531), A.I.R. 1924 Pat. 459, 78 I.C. 796; *Inderdawan v. Govind Lall*, 23 Cal. 790; *Lakhmidas v. Jamnadas*, 22 Bom. 304 (F.B.).

The benefit of this section cannot be claimed by a lessee. So where some out of several mortgaged properties are subsequently leased out, and the lessee has notice of the indebtedness of the mortgagor, the lessee is not entitled to say that the mortgage-debt should be satisfied by the sale first of the properties other than those subject to the lease—*H. V. Low & Co. v. Hazarimull*, 30 C.W.N. 183 (185), A.I.R. 1926 Cal. 525, 94 I.C. 786.

“Neither in England nor in this country has the doctrine been extended to a case where *only a portion* of the property already mortgaged is subsequently sold or mortgaged. If the prior mortgagee is forced to have recourse to a portion of the mortgaged property for the recovery of his money, it may be that both he and the mortgagor will be prejudiced, and the sale of the property in portions will not realise an adequate price. We do not, therefore, consider that it will be safe to extend the doctrine of marshalling to such a case.”—*Report of the Special Committee.*

The debtor must be the same:—No marshalling ought to be enforced unless the parties between whom it is enforced are creditors of the *same* person, and have demands against the property of the same person—*Ex parte Kendall*, (1811) 17 Ves. 520, 1 W. & T. L.C. 46; Halsbury's Laws of England, Vol. 21, p. 304; *Gopala v. Swaminathayyan*, 12 Mad. 255; *Ramaswamy v. Madura Mills*, (1916) 1 M.W.N. 265, 34 I.C. 338. A as manager and for family purposes gave a mortgage to B. The family subsequently got divided and the mortgaged property fell to the shares of A and C. Then A again gave a mortgage of part of his share to D, who, having sued on it, bought it in Court auction in execution of his decree. B now sued on his mortgage against A, C and D. D claimed marshalling. It was held that, as B and D were not creditors of the same person, no case for marshalling arose. One was a creditor of the coparcenary, and the other a separate creditor of one of the members of the family—*Gopala v. Swaminathayyan*, 12 Mad. 255; See also *Neelamegam v. Gobindan*, 14 Mad. 71.

488. Notice:—Old law:—The old section contained the words “who has not notice of the former mortgage” so that the second mortgagee could claim the benefit of marshalling under this section only when he had no notice of the earlier incumbrance—*Sesha Ayyar v. Krishna*, 24 Mad. 96 (106); *Kishan Chand v. Ramsukh Das*, 86 P.R. 1916, 33 I.C. 815; *Lakshmana v. Sankara Moorthy*, 25 M.L.J. 245, 18 I.C. 199 (201); *Ramaswamy v. Madura Mills*, (1916) 1 M.W.N. 265, 34 I.C. 338; *Naubat v. Mahadeo*, 51 All. 606, 27 A.L.J. 419, A.I.R. 1929 All. 309 (311), 116

I.C. 297. In order that the rule of marshalling could apply, it had to be shown that the second mortgagee obtained no notice either before or at the time of completion of his mortgage. And so there was nothing in this section to destroy the right of marshalling when the second mortgagee got the notice *subsequent* to the execution of his mortgage—*Inderdawn v. Gobind Lall*, 23 Cal. 790. The real question was whether the second mortgagee was aware of the prior mortgage *at the time* when he took his own mortgage; the fact that he came to know of the existence of the prior mortgage at the time he purchased the property in execution of his mortgage-decree did not deprive him of the right of marshalling which he had acquired already—*Rajkeshwar v. Md. Khalilul Rahman*, 3 Pat. 522 (532, 533), 78 I.C. 796, A.I.R. 1924 Pat. 459; *Inderdawn v. Gobind Lal*, 23 Cal. 790. Where no question of notice was raised in the Court of first instance or in the grounds of appeal but it was suggested for the first time during the arguments that the second mortgagee had notice of the first mortgage, the High Court disallowed the question—*Tara Prosanna v. Nilmoni*, 41 Cal. 418 (422), 25 I.C. 118.

It should be noted that in places in which this Act did not formerly apply the doctrine of marshalling was applied even though the subsequent mortgagor had notice of the prior incumbrance—*Dina v. Nathu*, 26 Bom. 538 (542); *Chunilal v. Fulchand*, 18 Bom. 160 (171); *Lakshmidas v. Jamnadas*, 22 Bom. 304 (314). Those cases were decided with reference to the English law under which the question of notice is immaterial and marshalling can be claimed in spite of it. See *Flint v. Howard*, (1893) 2 Ch. 54 (73).

Under the present section notice is immaterial:—In consonance with the rule of English law, the words referring to notice have been omitted from the present section. The following Note will explain the reason:—

“The section also requires that, in order that a subsequent mortgagee should be entitled to have the securities marshalled, it must be shown that he had no notice of the prior mortgage (I.L.R. 23 Cal. 790). This condition appears to have been based on the observations of Lord Hardwicke in *Lanoy v. Duke of Athol* (2 Atk. 446). In later English decisions this condition was held to be unnecessary. In *Gibson v. Seagrin* (20 Beav. 614) Lord Romilly remarked that the rule of marshalling was independent of the question whether the subsequent mortgagee had notice of the prior mortgage or not. [See also *Flint v. Howard* (1893) 2 Ch. 54, 73.] In India also, in cases where the Transfer of Property Act did not apply, it was held that a subsequent mortgagee could marshal securities even though he had notice of the prior mortgage (I.L.R. 18 Bom. 160; 22 Bom. 304). As stated in the leading case of *Aldrich v. Cooper* (1 W. & T.L.C., at p. 38), the principle of marshalling is that it shall not depend upon the will of one creditor to disappoint another and that equity intervenes to restrain the first creditor from resorting to the security of the subsequent creditor, until the other, which he alone possesses, is exhausted. Thus, according to the correct application of the principle, the question of notice of the prior mortgage to the subsequent encumbrancer is immaterial. Further, the words ‘not so as to prejudice the rights of the first mortgagee’ are sufficient to prevent any injustice being done to the prior mortgagee. We, therefore, propose that the words ‘who has not notice of the former mortgage’ should be omitted.”—*Report of the Special Committee*.

489. Rights of prior mortgagee unaffected:—The rule of marshalling should not be so applied as to interfere with the rights of the first mortgagee, who ought not to be restrained from satisfying his debt out of any portion of the property mortgaged to him that is readily available—*Wallis v. Woodyear*, 2 Jur. (N.S.) 179. As a rule, marshalling cannot be enforced against a prior mortgagee where there is any doubt as to the sufficiency of the fund upon which the junior creditor has no claim, or where the prior creditor is not willing to run the risk of obtaining satisfaction out of that fund, or where the fund is of a dubious character or is one which may involve him in litigation to realise—*Jones on Mortgages*, § 1628; cited in *Krishna v. Muthukumaraswamiya*, 29 Mad. 217 (223).

490. Prejudice of right of third parties or of transferees for value:—As this section refers to the right of the second mortgagee to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, it is clear that the time for the exercise of the right of marshalling is the time when the prior mortgagee seeks to realise his mortgage amount. If at that time there is already a person who has acquired for valuable consideration an interest in the property not mortgaged to the second mortgagee, then the right of marshalling does not exist—*Unnamalai v. Gopalaswami*, 54 Mad. 59, A.I.R. 1931 Mad. 199, 129 I.C. 655. The rule of marshalling will never be applied in favour of a subsequent incumbrancer when that will either really prejudice the rights of the prior incumbrancer or the rights of third parties—*Chunilal v. Fulchand*, 18 Bom. 160. “It was never the intention of marshalling to defeat the rights of successive incumbrancers or of any person having acquired an interest in any one of the properties for valuable consideration. The right of a subsequent mortgagee of one of the estates to marshal, that is, to throw the prior charge of both estates upon that which is not mortgaged to him, is an equity which is not enforced against third parties, that is, against any one except the mortgagor and his legal representatives claiming as volunteers under him. It is not enforced against a mortgagee or purchaser of the other estate”—*per* Hay J. in *Flint v. Howard*, (1893) 2 Ch. 54 (at p. 73). And the right of the prior mortgagee or the purchaser not to be marshalled does not depend upon whether he had notice of the second mortgage—*Unnamalai v. Gopalaswami*, *supra*; Ghose’s Law of Mortgage, Vol. 2, p. 812. The rule of marshalling was never intended to defeat the rights of other subsequent mortgagees. Thus, two estates (X and Y) are mortgaged to A and one (X) is afterwards mortgaged to B, the remaining estate (Y) being then mortgaged to C. Here B has no equity to throw the whole of A’s mortgage on C’s estate (Y) and so destroy C’s security. And for the same reason C cannot marshal. In such a case, A must satisfy himself out of two estates rateably, according to the respective values of the two estates, and leave the surplus proceeds of each estate to be applied in payment of the respective incumbrances thereon—*per* Lord Romilly in *Gibson v. Seagrin*, 20 Beav. 614 (619).

The word “valuable” which occurred before the word “consideration” has been omitted, because “the Indian Law does not recognize any distinction between good and valuable consideration (see sec. 25 of the Indian Contract Act, and Pollock and Mulla’s Contract Act, p. 34).”—*Report of the Special Committee*.

82. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Contribution
to mortgage-
debt.

82. *Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.*

Contribution
to mortgage-
debt.

Where of two properties belonging to the same owner, one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the *subsequent* mortgagee.

Amendment:—By sec. 43 of the T. P. Amendment Act (XX of 1929) the first para of this section has been redrafted, and in the third para the word 'subsequent' has been substituted for the word "second." The reasons are stated below in proper places.

491. Section analysed:—The three paragraphs into which the section is sub-divided enunciates rules which have to be discriminated. The first paragraph declares the manner in which the debt charged on several properties or several portions of the same property shall be borne by them. It recognizes a lien possessed by the person who being interested in one of the mortgaged properties (or in a portion of the mortgaged property) pays off the debt and so acquires a right of contribution. The second paragraph then deals with a case in which, the first mortgage having been paid off out of the only property comprised in it, it remains to be determined how the second mortgage-debt is to be borne as between

the remainder of that property and another property which is also made a security for the second debt. In such a case, contribution works, not in favour of the second mortgagee, but in favour of other persons interested in one or other of the two properties comprised in the mortgage—*Sesha Ayyar v. Krishna Aiyanger*, 24 Mad. 96 (106, 107).

Principle:—This section is an embodiment of the principle that a property which is equally liable with other property to pay a debt shall not escape, because the creditor has been paid out of that other property alone—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (416); *Muhammad Yahiya v. Rashiduddin*, 31 All. 65 (67); Fisher on Mortgage, 6th Ed. § 1346. "If several estates (whether of one or several owners) be mortgaged for or subject equally to one debt.....the several estates shall contribute rateably to that debt; being valued for that purpose, after deducting from each estate any other incumbrances by which it is affected"—Fisher on Mortgage, 6th Ed. p. 688. The reason given for this principle is that "the law requires equality; one shall not bear the burthen in case of the rest"—*Per Eyre C. B. in Dering v. Earl of Winchelsea*, (1787) 2 W. & T.L.C. (7th Edn.) p. 535, cited in 26 All. 407 (436). It also lays down that parties who were equally bound with another to satisfy a debt and who are relieved by that other from the burden of the debt should contribute rateably towards the satisfaction of the debt—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (416).

Contribution cannot be claimed from a co-mortgagor whose property equally with the property of the claimant, has been sold at the instance of the mortgagee, because it has already contributed its proportion of the debt—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (441); *Hari Raj v. Ahmad-ud-din*, 19 All. 545.

Where the property of one of the co-mortgagors has been sold, but the sale has not satisfied the *entire* mortgage-decree, he cannot claim contribution in respect of the excess realised from his property over and above its rateable proportion of the debt. A claim for contribution cannot arise until the *whole* of the mortgage-debt has been satisfied—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (426, 427) (F.B.). But where the whole of the mortgage-money has been realised by the sale of the properties of some of the mortgagors, one of them can bring a suit for contribution against those co-mortgagors whose property has not been sold, although the mortgage-debt has not been wholly satisfied by the sale of the plaintiff's property alone—*Muhammad Yahiya v. Rashiduddin*, 31 All. 65 (66); *Muhammad Mian v. Bharat*, 7 O.W.N. 401, A.I.R. 1930 Oudh 260 (263). 125 I.C. 402.

The claim to contribution arises, whether the payment has been made by the claimant by a *voluntary* sale of his property or the payment has been *enforced* by sale of his property—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (F.B.); *Muhammad Mian v. Bharat*, *supra*.

492. Rateable apportionment:—The equitable rule of rateable apportionment is somewhat different from marshalling and contribution. This equitable rule is in accordance with justice and fair dealing and though not the subject of any special statutory provision, is not excluded by any statutory provision, and is accordingly applicable in India. This right is one which is possessed by a mortgagee against the mortgagor. Thus, the properties A and B of equal value are mortgaged to X to secure

an advance equal to the value of either, and a second mortgage on A is taken by Y and a second mortgage on B is taken by Z. In these circumstances, if X pays himself by taking the whole of A, leaving B unencumbered, it will work to the disadvantage of Y or Z. It is not therefore fair that such exercise of election by X should advantage the mortgagor and work to the disadvantage of the subsequent mortgagees. In such a case, X must take his debt out of the two properties A and B in the proportion of the values of the properties—*Official Assignee v. Byramshaw*, 61 M.L.J. 512, 135 I.C. 316, A.I.R. 1932 Mad. 196 (197).

493. Scope of section:—*Mortgagee's right to proceed against all the properties:*—This section defines the relations of the mortgagors *inter se*, and there is nothing in the language of the section which supports the conclusion that the mortgagee must distribute his debt in a certain manner, or that he is unable to enforce it against each and every part of the property made security for the mortgage—*Timaji Krishna v. Rama*, 20 Bom. L.R. 175, 45 I.C. 862; *Raghunath v. Harlal*, 18 Cal. 320; *Abdul Rahim v. Abdul*, 22 S.L.R. 243, 106 I.C. 872, A.I.R. 1928 Sind 101 (103). The mortgagee's right to be paid the whole of his debt from whatever portion of the mortgaged properties he wishes to comprise in his suit, cannot be questioned—*Krishna v. Muthu Kumaraswamiya*, 29 Mad. 217 (225). Ordinarily, if two properties are jointly mortgaged for the same debt, each of these properties is liable for the whole, and it is open to the mortgagee either to proceed against the whole mortgaged property or against a part of such property—*Ghasi Khan v. Thakur Kishori*, 1929 A.L.J. 846, A.I.R. 1929 All. 380 (381), 119 I.C. 437. There is nothing in this Act to support the view that as between a mortgagee and the holders of the equity of redemption the former is bound to distribute his debt rateably upon the mortgaged properties—*Hara Kumari v. Eastern Mortgage and Agency Co.*, 7 C.L.J. 274; *Abdul Rahim v. Abdul*, *supra*. Therefore, where upon a suit being brought on a mortgage by the mortgagee, the several purchasers of the mortgaged properties sought to be permitted to pay off the mortgage-debt in shares proportionate to the property purchased by each of them, it was held that the section did not authorise the splitting up of the lien of the mortgagee in this manner but that its object was merely to fix the liability of the mortgagors or their purchasers *inter se*, and that therefore the mortgagee was entitled to proceed against all the mortgaged properties leaving it to any of the defendants who might have to pay more than his rateable share to recover it from his co-debtors in accordance with this section—*Raghu Nath v. Harlal*, 18 Cal. 320 (321, 322).

If, however by the laches of the mortgagee, his claim against some of the mortgagors has become time-barred, he cannot claim to throw the entire burden upon the rest of the properties. In such a case any owner of a portion of the mortgaged properties is legitimately entitled to ask that not more than a rateable part of the mortgaged debt should be thrown upon the property in his hands—*Imam Ali v. Baij Nath*, 33 Cal. 613 (621); *Budhamal v. Rama*, 44 Bom. 223 (226). Similarly, a mortgagee cannot release a portion of the property from the mortgage-debt, so as to increase the burden upon the other portions, without the privity and consent of the persons affected. The owners of the properties not released are entitled to insist that not more than a proportionate share of the mortgage-debt shall be levied upon the properties in their hands—

Imam Ali v. Baij Nath, 33 Cal. 613 (622), following *Surjiram v. Barhamdeo*, 1 C.L.J. 337 and 2 C.L.J. 202, and dissenting from *Sheo Prasad v. Behary*, 25 All. 79.

“Contract to the contrary”:—The mortgaged properties are liable to contribute rateably to a mortgage-debt only in the absence of a contract to the contrary. Where it is intended by the different owners of several properties that each and every item should be liable to contribute in a manner different from the one described in sec. 82, it would be open to them to agree among themselves to that effect. This section enunciates a rule to be applied only where the mortgagors among themselves did not come to any terms. But the Legislature leave it to the parties to the transaction to lay down any different rule for themselves if they wanted any such different rule—*Asiz Ahmad v. Chhote Lal*, 50 All. 569, 109 I.C. 38, 26 A.L.J. 298, A.I.R. 1928 All. 241 (247). The rule under this section may be modified by the terms of a contract refusing contribution. Thus, although all the properties may be originally equally liable for the mortgage-debt, this liability may be altered by a mortgage-decree or by an arrangement made between the parties by which the burden of the debt may be thrown primarily on some of the properties, and the other properties may be made liable only if the debt is not realised by the sale of the first-named properties—*Satyakripal v. Gopikishore*, 6 C.W.N. 583; *Ramabhadrachar v. Srinivasa*, 24 Mad. 85. Where a mortgaged property is sold in two portions to two purchasers, one of whom purchases without notice of the mortgage and with a covenant against incumbrances, and the other person purchases with an *express undertaking to pay off the entire mortgage*, the latter purchaser, if he discharges the entire incumbrance, is not entitled to obtain contribution from the other purchaser—*Kamla v. Chaturbhuj*, 8 Pat. 585, A.I.R. 1929 Pat. 664 (676), 120 I.C. 17. The words ‘contract to the contrary’ mean a contract between the mortgagor and the mortgagee and not a contract between the mortgagor and his vendee. A mortgaged properties X and Y to B. Subsequently A sold property X to C and out of the consideration left sufficient money with the vendee to redeem B’s mortgage. Afterwards the property Y was sold in execution of a decree against A and was purchased by D. C failed to redeem B’s mortgage, and B brought a suit on his mortgage and got a decree; C paid the decretal amount and sued D for contribution. *Held* that C was entitled to contribution as against D. D was not entitled to enforce the agreement between C and A to redeem B’s mortgage, being a stranger to the agreement. The auction sale to D gave rise to no covenant attaching to the property which could pass upon a sale of that property—*Charan Singh v. Ganeshi Lal*, 24 A.L.J. 401, 94 I.C. 1048, A.I.R. 1926 All. 352, affirmed by the Privy Council in *Ganeshi Lal v. Charan Singh*, 52 All. 358 (P.C.), 1930 A.L.J. 753, 34 C.W.N. 661 (666), 124 I.C. 911, A.I.R. 1930 P.C. 183. See also *Mahomed Inamulla v. Aisha Bibi*, 24 A.L.J. 714, 96 I.C. 765; *Sonaji v. Krishna Rao*, 27 N.L.R. 258, A.I.R. 1931 Nag. 172. An agreement binding only between the *mortgagors* is not a “contract to the contrary” within the meaning of this section; these words are intended to apply to contracts made between the *mortgagor and the mortgagee*—*Rambhadrachar v. Srinivasa*, 24 Mad. 85; *Sonaji v. Krishnarao*, *supra*. The contract may be entered into either at the time of the mortgage or afterwards—*Ram v. Manak*, 7 Bom. L.R. 191.

494. First para:—This para has been amended for the following reason:—

“This section enunciates the rule of contribution, where several properties are mortgaged. In our opinion, the principle of contribution ought to cover a case not only where several properties are mortgaged, but where the mortgaged property is subsequently sub-divided into distinct and separate portions, the liability of the co-sharers being distinct and several and not joint. This question was raised in I.L.R. 26 Mad. 686, but was not decided. In some cases it has been held that when the title becomes severed after the mortgage either by the death of the mortgagor or by the sale of the shares in the property by the mortgagor, the rule of contribution applies (*see* 1 All. 455; 20 Bom. 615; 21 C.L.J. 104; 43 All. 589). We propose to amend the section to make this point clear.”
—*Report of the Special Committee.*

The words “shares in” are intended to make it clear that this para applies to cases where property is owned by several owners but has not been physically partitioned—*Report of the Select Committee* (1929).

In other words, the rule of contribution applies not only where several properties are mortgaged and the owner of one of them is compelled to satisfy the whole mortgage-debt, but it also applies where only one property held by several co-owners is mortgaged and the portion of one co-owner is made to satisfy the mortgage.

Where the original mortgagor died and the property came into the hands of his representatives, and one of them satisfied the entire mortgage-decree obtained by the mortgagee, it was held under the old section that his suit for contribution against the other representatives did not fall under this section, as there was but *one* property mortgaged—*Nawab Jahanara v. Mirza Shujaiddin*, 9 C.W.N. 865 (867). This is no longer good law, in view of the above amendment.

The rule of contribution enunciated in this section is akin to the rule contained in sec. 95, with this difference that the former section supposes a case where the mortgage-debt is realised by the mortgagee by a forced sale of the property of one of several co-owners, whereas in the latter section (95) the case is one of redemption of the mortgaged property by one of several co-owners in the usual way. But the right to claim contribution is the same in both cases. See *Dhakeshwar v. Harihar*, 21 C.L.J. 104, 27 I.C. 780 (783).

Where the owner of a portion of the property comprised in a mortgage, in order to save his share from sale, has satisfied a decree obtained by the mortgagee on the mortgage, he is entitled to claim contribution from the owner of another portion of the mortgaged property—*Chagandas v. Gansing*, 20 Bom. 615. The purchaser of a share in a mortgaged estate, who has paid off the whole mortgage-debt in order to save the estate from foreclosure or sale can claim from each of the other co-mortgagors a contribution proportionate to his interest in the property—*Hira Chand v. Abdal*, 1 All. 455 (456); *Danappa v. Yamnappa*, 26 Bom. 379.

Where several parcels of property are mortgaged to secure one debt, every parcel is liable to the mortgagee for the whole amount of the debt; but as between themselves each parcel is liable to contribute to the debt in the proportion which its value bears to the value of the whole property comprised in the mortgage. So also, every person who purchases one

of those properties incurs a liability to that extent—*Bisheshur v. Ram Sarup*, 22 All. 284 (289) (F.B.). If the mortgagee purchases the equity of redemption (either by private sale or at Court sale) in a portion of the mortgaged property, he cannot proceed against the remaining properties in respect of the full amount of the debt, but the portion purchased by him must contribute towards the debt, i.e., must be chargeable with a proportionate part of the debt. The purchase will discharge a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the entire property comprised in the mortgage—*Bisheshur v. Ramsarup*, 22 All. 284 (F.B.); *Ponnambala v. Annamalai*, 43 Mad. 372 (379) (F.B.); *Lakshmidas v. Jamnadas*, 22 Bom. 304; *Krishna Chandra v. Pabna Model Co.*, 59 Cal. 76, 137 I.C. 260, A.I.R. 1932 Cal. 319; *Mir Eusuff Ali v. Panchanan*, 15 C.W.N. 800 (803), 6 I.C. 842; *Sabir v. Kirasat*, 1929 A.L.J. 1162, A.I.R. 1929 All. 696 (697); *Gian Singh v. Atma Ram*, 34 P.L.R. 532, A.I.R. 1933 Lah. 374.

A subsequent mortgagee of a portion of the property purchasing under his decree cannot plead that the property in the hands of the mortgagor alone is responsible for the payment of the full amount of a prior mortgage; but the subsequent mortgagee-purchaser and the mortgagor must contribute rateably—*Naubat v. Mahadeo*, 51 All. 606, 1929 A.L.J. 419, 116 I.C. 297, A.I.R. 1929 All. 309 (311), following 22 All. 284 above.

Where several properties are mortgaged, and the sum actually advanced is less than that mentioned in the deed, the equitable method of dealing with the case would be to distribute the reductions of principal over each item of property covered by the mortgage—*Shib Chandra v. Lachmi*, 33 C.W.N. 1091 (1095) (P.C.), A.I.R. 1929 P.C. 243, 119 I.C. 612.

Where part of the mortgaged properties was purchased, subject to the mortgage, at an auction sale in execution of a simple money decree against the mortgagor, and then the mortgagee brought a suit on the mortgage and realised the mortgage-debt from the property remaining in the hands of the mortgagor, *held* that the mortgagor had a right of contribution, under this section, as against the auction purchaser in respect of the amount which the property in his hand had contributed in excess of its rateable share of the liability—*Rama Shankar v. Ghulam Hussain*, 43 All. 589, 63 I.C. 209. Three mortgages were created on the same property in 1880, 1889 and 1891. The mortgagor then died and his sons partitioned the mortgaged property into several mahals. The first mortgagee brought a suit for sale on his mortgage of 1880, obtained a decree, brought to sale the share of H, (one of the brothers) and the mortgage was discharged. Thereafter H brought a suit for contribution and obtained a decree. The other brothers then discharged the later mortgages of 1889 and 1891, and brought the present suit against H, claiming that they also had a charge under sec. 82. *Held* that the plaintiffs were not entitled to a charge; because firstly, it was useless to them to claim any charge against the mahal of H, which had already been sold in discharge of the first mortgage, and secondly, as H's charge took priority from the date of the mortgage of 1880, the plaintiffs, who stood in the shoes of the mortgagees under the mortgages of 1889 and 1891, were puisne to H—*Kashi Ram v. Het Singh*, 37 All. 101 (103, 104). Certain properties including a house were mortgaged. Subsequently, the defendant purchased half of the house from the mortgagor who then conveyed the equity of redemption in respect of all the mortgaged properties to the mortgagee. In a suit

by the latter to enforce his mortgage by sale of the mortgaged properties, *held* that having regard to the terms of this section, it was improper to order the property to be sold without fixing the proportion of the mortgage-debt chargeable on the house purchased by the defendant—*Maharaja Ramnarain v. Ram Kumar*, 1 P.L.J. 228 (230), 36 I.C. 208.

Certain lands X and Y were mortgaged to R. Subsequently X was mortgaged to S together with other lands. R then obtained a decree on his mortgage, in pursuance whereof X was sold. R's decree was thus satisfied without the necessity of the sale of Y. Y was purchased by K. S then sued on his mortgage and claimed not only as against his mortgagor the property X but also on the principle of contribution, sought to charge any balance which might still remain due as against Y which was purchased by K. *Held* that S was not entitled to enforce contribution as against K. Neither the first nor the second para of this section applied—*Sesha Ayyar v. Krishna*, 24 Mad. 96 (108).

Where an assignment of a part of the mortgaged properties is made *free from incumbrances*, the assignee is not liable to contribute, as against the assignor, to the payment of the mortgage-debt. To entitle one to contribution from another, the equities must be equal. If, for instance, there was any obligation on the person who paid the encumbrance to discharge it as a debt of his own, he cannot claim anything from that other; and similarly, if a mortgagor sells a part of an encumbered estate with a covenant against incumbrance, he cannot claim contribution from the purchaser, because he is himself liable for the whole debt—*Visva Natha v. Vengama*, 19 L.W. 567, A.I.R. 1924 Mad. 749 (753), 78 I.C. 52. See Ghose's Law of Mortgage, 5th Edn., pp. 399, 400.

495. Ascertainment of value:—This section contemplates that the properties are liable to contribute rateably according to their values at the *date of the mortgage* and not at a future date—*Mardan Singh v. Sheo Dayal*, 27 All. 549; *Gobind Chandra v. Kailash*, 25 C.L.J. 354, 40 I.C. 230; *Jugdeo v. Habibulla*, 12 C.W.N. 107; *Shankar v. Latafat*, 14 A.L.J. 713, 35 I.C. 600; *Bhagwan v. Muhammad Muzhar*, 36 All. 272, 23 I.C. 339. If any other date than the date of the mortgage was to be taken as the time at which the properties were to be valued for the purpose of this section, it would follow that a party who being the owner of a portion of the mortgaged property had expended money and labour in improving his property would thereby render himself liable to pay a larger contribution by reason of the fact that he had increased the value of his property. This obviously would be inequitable—*Mardan Singh v. Sheo Dayal*, 27 All. 549. But the Rangoon High Court did not adopt this hard and fast rule and remarked that it might similarly be argued that to take the date as the date of the mortgage would operate hardly on an owner whose property through no fault of his own had very seriously depreciated since the mortgage. Each case must be considered on its special circumstances—*Nyaunglebin Co-operative Bank v. Maung Ba*, 6 Rang. 417, 114 I.C. 290, A.I.R. 1928 Rang. 266. The Bombay High Court laid down that the value would be as at the date of purchase—*Fakiraya v. Gudigaya*, 26 Bom. 88 (98).

The Legislature has adopted the Allahabad view and amended the section accordingly. "There is some difference of opinion as to whether for the purposes of contribution the value of the different properties or the portions of one property should be calculated as at the date of the

original mortgage or at the date of the subsequent transfer. In some cases it has been held that valuation is to be made as at the date of the mortgage irrespective of the price that may have been paid by the purchaser (*see* 12 C.W.N. 107, 745; 27 All. 549). In a Bombay case, however the valuation at the date of the sale was adopted (I.L.R. 26 Bom. 88). We propose to provide that the value taken shall be the value as at the date of the original mortgage. This rule has the support of the Judicial Committee who, in assessing contribution to a decree for mesne profits, assessed liability at the date of the decree (31 Cal. 597, L.R. 31 I.A. 94)"—*Report of the Special Committee*.

To arrive at the value for contribution purposes of each of several properties on which a particular mortgage is secured, the amount of all prior incumbrances upon such properties must be ascertained and deducted. Where properties A, B and C are all made security for one mortgage, and the property A is subject to a prior incumbrance jointly with properties X, Y and Z, the rateable share to be attributed to A under the prior incumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage. It is incorrect to say that it is only necessary in such case to see what was the total amount of the prior incumbrance to which A was liable irrespective of the question whether that liability was to be shared by X, Y and Z—*Faqir Chand v. Aziz Ahmad*, 54 All. 199 (P.C.), 36 C.W.N. 437, 136 I.C. 751, A.I.R. 1932 P.C. 74. When a co-mortgagor is suing the other co-mortgagor for contribution upon the allegation that the portion of the mortgaged property in which he is interested has been made to discharge more than its proper share of liability under the mortgage, the Court in assessing contribution has first to ascertain the various items of property in question as they stood at the date of the mortgage; next, the rateable liability of each item for the amount payable under the decree; next, how much each item has contributed to the payment of the decretal amount, disregarding any purchase money which any of the purchaser has paid or retained, and it should then proceed to apportion the liability between the different items of property—*Bhagwan Singh v. Md. Mazhar Ali*, 36 All. 272.

Where at the date of the mortgage, there was no house on the site but a holding had only been begun, but the mortgage-deed described the property as "a house with five rooms, kitchen etc." *held*, under the special circumstances of the case that the value of the house, though not existing at the date of the mortgage, must be considered in determining the proportionate amounts to be charged on the various mortgaged properties—*Nyaunglebin Co-operative Bank*, *supra*.

For the purpose of satisfactorily ascertaining the value of the different items of property, all persons in whom the mortgaged property is vested should be made parties in a suit for contribution—*Shankar Lal v. Latafat Ali*, 14 A.L.J. 713, 35 I.C. 600.

The word 'incumbrance' in the old section has been replaced by the words "mortgage or charge." 'Incumbrance' was nowhere defined in this Act, and in *Aziz Ahmad v. Chhote Lal*, 50 All. 569, 109 I.C. 38, A.I.R. 1928 All. 241 (246), it was interpreted as having a larger meaning than a mere mortgage; it might mean any claim, lien or liability, so as to include, say, a permanent lease carved out of a mortgaged property. The words "amount of any other incumbrance" did not necessarily mean the proportionate mortgage-money according to the rule of contribution.

496. Para 2:—Where of two properties belonging to the same owner, one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, then for the purpose of apportioning the liability of the respective properties in regard to the subsequent mortgage, the value of the two properties must be taken into account, and credit given for the amount due upon the earlier mortgage out of the value of the property comprised in the subsequent mortgage. Where the amount due under the earlier mortgage exceeds the value of the property comprised in that mortgage, the necessary result is that the whole of the amount of the second mortgage is recoverable from the other property comprised in the latter mortgage—*Ghulam Hazrat v. Gobardhan*, 33 All. 387, 9 I.C. 933.

Last Para:—The last para declares that the right of contribution shall be subject to the rule of marshalling. That is, where marshalling and contribution might conflict with each other, marshalling is to prevail. Shephard and Brown, 7th Edn., p. 346.

The word 'second' has been replaced by the word 'subsequent.' This is consequential to a similar amendment made in sec. 81 (*Report of the Special Committee*).

497. Contribution whether creates a charge:—The liability to contribute to the common burden attaches to the *properties* subject to that burden, and not *personally* to the owners of those properties. Consequently these properties are made security for the payment of the amount of re-imbursement, and a *charge* is created on them as defined in sec. 100—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (443, 444); *Bhagwan Das v. Karam Husain*, 33 All. 708 (716) (F.B.); *Danappa v. Yamnappa*, 26 Bom. 379; *Sesha v. Krishna*, 24 Mad. 96 (107); *Har Prasad v. Raghunandan*, 31 All. 166 (168); *Sabir v. Rirasat*, 1929 A.L.J. 1162, A.I.R. 1929 All. 696 (698); *Muhammad Mian v. Bharat*, 7 O.W.N. 401, A.I.R. 1930 Oudh 260 (263), 125 I.C. 402. A contrary view has been taken in *Nawab Jahanara v. Mirza Shujaud din*, 9 C.W.N. 865 (867). Since the liability to contribute is not a *personal* liability, but is made a *charge* on the other properties which have not discharged their own share of the debt, a *purchaser* of a portion of such properties is liable to contribute rateably—*Muhammad Mian v. Bharat*, *supra*.

But where the sale of the property of one of the co-mortgagors has not satisfied the *entire* mortgage-debt, he has no right to claim contribution, and consequently has no charge on the properties of the other co-mortgagors in respect of the excess realised by sale of his property over and above its rateable share of the debt—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (432, 433) (F.B.). But if the properties of some of the mortgagors are sold and the mortgage is *fully* paid off by the sales, one of the mortgagors can maintain a suit for contribution, and can claim a charge on the other properties, although the mortgage has not been satisfied by sale of *his* property alone—*Bhagwan Das v. Karam Husain*, 33 All. 708 (716, 717) (F.B.), following *Muhammad Yahiya v. Rashiduddin*, 31 All. 65.

If the property against which the charge is sought to be enforced has been sold, the lien is transferred to the surplus sale proceeds—*Bhagwan Das v. Karam Husain*, 33 All. 708 (725) (F.B.).

Deposit in Court.

83. At any time after the principal money *payable in respect of any mortgage* has become *due*, and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Power to deposit in Court money due on mortgage.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed *and all documents* in his possession or power *relating to the mortgaged property*, apply for and receive the money, and the mortgage-deed *and all such other documents* so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Right to money deposited by mortgagor.

Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.

Amendment:—The following amendments have been made by sec. 44 of the T. P. Amendment Act (XX of 1929):—(1) The words “payable in respect of any mortgage has become *due*” have been substituted for the words “has become payable”; (2) certain words relating to documents have been added at the end of the second para; (3) the third para has been newly added. These amendments have been made to bring this section into a line with sec. 60.

“In addition to the remedies open to a mortgagor for redemption by tender out of Court or by a suit, this section provides a summary procedure for redemption. The section is a survival of the repealed Bengal Regulations I of 1798 and XVII of 1806. Deposit made under this section has all the effects of a valid tender, and the withdrawal of the deposit by the mortgagee has the effect of discharging the mortgage (I.L.R. 17 Mad.

267). According to the rules framed with reference to this section by the High Courts of Calcutta, Madras and Bombay, the mortgagee, before he is entitled to draw the money, may be required to file all documents of title that are in his possession and also a draft re-conveyance or an acknowledgment as he would be required to do under section 60. In the absence of an express provision similar to that in the first paragraph of section 60, the validity of those rules has been doubted (*see* Shephard and Brown's Transfer of Property Act, p. 352, 7th Edn.). The proposed amendment is intended to remove this doubt."—*Report of the Special Committee.*

497A. Object of section:—This section has been enacted in the interests of the mortgagor, so that the mortgage might be discharged by him without any litigation—*Anandi Ram v. Dur Najaf*, 13 All. 195. It confers an exceptional privilege on mortgagors, which other debtors do not enjoy, of paying the amount of their debt into Court and so relieving themselves of any further liability—*Debendra v. Sona*, 26 All. 291.

A mortgagor has got three remedies: He may, after the mortgage-money has become due and before his right to redeem is barred, either (1) pay or tender privately to the mortgagee, at the proper time and place, the amount due on the mortgage under section 60 and recover the mortgaged property; (2) deposit that amount in Court under section 83, and claim redemption in that way; or (3) sue for redemption under sec. 91—*Ilet Singh v. Bihari*, 43 All. 95 (100); *Sardar Karan Singh v. Raja Muhammad Siddik*, 4 O.C. 387B.

This section is confined only to money due under a mortgage. It has no application to money due under a simple money-bond—*Eshahuq Molla v. Abdul Bari*, 31 Cal. 183 (185).

498. Deposit:—The deposit under this section must be made unconditionally. Where the mortgagor says that the money should not be paid *unless* the mortgagee produces certain deeds, it is not a valid deposit—*Nanu v. Manchee*, 14 Mad. 49. Where the mortgagor deposited the amount in Court but did not admit that the plaintiff was the person entitled to the money, and prayed that the amount should be paid to the plaintiff *if* it was proved to the satisfaction of the Court that he was the person entitled to recover the mortgage-debt, *held* that the tender into Court amounted to a conditional tender and not therefore valid in law—*Anandrao v. Durgabai*, 22 Bom. 761. But a deposit made under this section is good when made in good faith for being taken over by the mortgagees, although the mortgagors in their application purported to reserve their rights to dispute whether the mortgagees were entitled to the entire amount deposited—*Salik Ram v. Ashiq Hussain*, 4 O.C. 355. That is, a tender made under protest reserving the right of the debtor to dispute the amount due (and not the *title* of the creditor to receive the amount) is a good tender if it does not impose any condition on the creditor—*Greenwood v. Sutcliffe*, (1892) 1 Ch. 1. A deposit accompanied by a petition that the money might be retained in Court until the disposal of certain objections made by the mortgagor, is not a valid tender—*Goluckmonee v. Nubungo*, W.R. Special Number (F.B.) 14. But a deposit accompanied with a demand for a registered receipt (to which the mortgagee agrees) and the restoration of certain title-deeds, is not a conditional deposit, and is therefore valid—*Kora Naya v. Ramappa*, 17 Mad. 267. But a condition requiring a return of certain documents to which the mortgagor is not

entitled, attached to a deposit under this section, vitiates the tender—*In re Achath Sankaran*, 29 I.C. 586.

As stated above, a deposit made under protest is not invalid if it merely reserves the right of the debtor to dispute the *amount* due—*Greenwood v. Sutcliffe*, [1892] 1 Ch. 1. But where the mortgagor in making the deposit denies the mortgage altogether and threatens to sue to recover back the money so deposited, the deposit cannot be held to be valid—*Abdoor Rahman v. Kistolal*, 6 W.R. 225. Where the deposit is accompanied with a denial of the mortgagees' right to receive it, and with a threat that legal proceedings will be taken against him if he takes the money out of Court, the tender is invalid and does not prevent a foreclosure—*Makhan Kuar v. Jasoda*, 6 All. 399; *Prannath v. Rookia Begum*, 7 M.I.A. 323 (343). But where in depositing the money the mortgagor informs the Court that he has other claims against the mortgagee, unconnected with the mortgage, in respect of which he can take legal proceedings, the validity of the deposit is not affected—*Salik Ram v. Ashiq Hussain*, 4 O.C. 355.

499. Deposit when can be made:—Depositing the money due on a bond in Court, *before* the due date, is no valid tender of the debt—*Eshahuq Molla v. Abdul Bari*, 31 Cal. 183.

According to the terms of this section, the deposit is to be made "at any time after the principal money has become due", and as these words occur also in sec. 60, it follows that the right of deposit arises only when the right of redemption accrues. Where, therefore, a consent-decree provided that if the mortgagor committed default in the payment of a fixed amount within a particular date, the mortgagee should be entitled to take possession; default was made in payment on that date, but the mortgagee did not obtain possession on that date but on a subsequent date, before which however, the mortgagor deposited the amount in Court; *held* that since according to the consent-decree the right to redeem could only accrue after the mortgagor had delivered possession to the mortgagee, the mortgagor could not defeat the right of possession which had accrued to the mortgagee, by making a deposit of the mortgage-amount before delivery of possession. The deposit was therefore premature and invalid, and the provisions of secs. 83 and 84 could not apply to the case—*Ram Sonji v. Krishnaji*, 26 Bom. 312. It seems that the learned Judge in this case has run after the shadow instead of grasping the substance. He had laid a great emphasis on the delivery of possession, but was possession the essence of the covenant in the consent-decree? The Court ought to have looked to the interests of the mortgagor by allowing him to deposit the money, having regard to the fact that the date of payment of the principal money had expired and the requirement of this section had therefore been fulfilled, instead of giving so much importance to the covenant for possession, which was nothing more than a penal clause. And since it is in the power of the mortgagor to deposit the money the very next day after he gives possession to the mortgagee, what is the use of passing an order making the deposit conditional on the farce of a formality of delivering the possession? This case has been followed by the Madras High Court in *Bayya Sao v. Narasinga*, 35 Mad. 209, though here the facts are somewhat different: It was provided in the mortgage-bond that the mortgagee was to remain in possession for a certain number of years and that if on a specified date (21st March 1905) at the end of the period the mortgagor failed to discharge the debt, the mortgagee was to remain

in possession for a further term of five years. The mortgagor not only failed to pay the money on the due date (21st March 1905) but also took possession of the property from the mortgagee in May 1905, without discharging the debt. Subsequently he made a deposit of the money in Court under this section. The Madras High Court held that the mortgagor was not entitled to make the deposit. Since he failed to pay on the stipulated date (21st March 1905), he was bound to allow the mortgagee to remain in possession for a further period of 5 years, and he would be entitled to deposit the money after he restored possession to the mortgagee and allowed him to retain possession for that period. The deposit was therefore held to be premature and invalid. But the correctness of this ruling may now be doubted in view of the recent Privy Council decision in *Muhammad Sher Khan v. Seth Swami Dayal*, 44 All. 185. See this case cited at p. 353 *ante* under sec. 60. Applying the principle of that decision to the Madras case it would follow that the mortgagor had a statutory right of redemption after the expiry of the stipulated date (21st March 1905) and was entitled to deposit the money on any day after that date, without waiting for a further period of five years according to the stipulation contained in the deed. The deposit was therefore *not premature*, in the light of the Privy Council ruling.

500. Who can deposit:—Under this section, a deposit may be made by the mortgagor or by any person “entitled to institute a suit for redemption.” An owner of a share of the mortgaged property is entitled to deposit the mortgage-debt, because he is a person entitled under sec. 91 of the Act to sue for redemption and consequently comes within the words “or any other person entitled to institute such suit.” Such a person, in making a deposit under this section, is not bound by the restrictions imposed by the last para of sec. 60. Therefore, an owner of a portion of the mortgaged properties is entitled to make a deposit of the *whole* of the mortgage-debt and redeem the whole mortgage (and not *his own share alone*, as in sec. 60), in spite of the fact that the mortgagee has acquired by purchase a part of the mortgaged properties; there is no limitation in the language of sec. 83 as in sec. 60—*Subba Rao v. Sarvarayudu*, 47 Mad. 7 (11, 20), 44 M.L.J. 534, A.I.R. 1923 Mad. 533, 72 I.C. 292.

Where the mortgagee has purchased the equity of redemption in some of the mortgaged properties, and one of the mortgagors deposits or tenders the whole mortgage-amount, the mortgagee has no right to retain possession after the tender or deposit, and should be made accountable on that basis; having regard to practical convenience and the scheme of the Transfer of Property Act, the proper course in a case like this would be to determine the amount of the mortgage-debt for which the items purchased by the mortgagee would be proportionately chargeable, and finally settle the question arising between the parties by allowing the mortgagee to retain possession of them on payment of that proportionate amount—*Ibid.* (at p. 16).

A person in whose favour there is only an agreement to sell immovable property is a person who has no interest in the property, and is consequently not a person who is entitled to file a suit for redemption under sec. 91; he cannot therefore deposit any money under sec. 83—*Mayappa v. Kolandaivelu*, 1926 M.W.N. 459, A.I.R. 1926 Mad. 597, 92 I.C. 715.

501. “In any Court”:—A deposit can be made into Court even

though according to the mortgage-deed the money is made payable at a certain place—*Sardar Karam v. Raja Muhammad*, 4 O.C. 387.

The deposit should be made in the Court in which he might have instituted his suit for redemption, or in which the mortgagee might have instituted his suit for enforcement of his security under sec. 67. Therefore, after one Court has taken cognizance of a suit by the mortgagee for the enforcement of his mortgage, the mortgagor cannot deposit the mortgage amount in another Court—*Bayya Sao v. Narasinga*, 35 Mad. 209, 10 I.C. 393.

502. To whose credit:—Payment under this section must be made to the credit of the mortgagee alone, so that the mortgagee may, on receipt of the notice of deposit, apply to the Court by petition and forthwith obtain payment without the concurrence or sanction of any other person. A deposit of money made payable not to the mortgagee by himself but jointly to him and a third person (even though such person be the mortgagee's pleader) cannot be regarded as unconditional so as to be valid. A mortgagor who makes a payment which involves the necessity of an inquiry by the Court as to the rights of parties other than the mortgagee, cannot be said to have made a valid payment under this section—*Debendra Mohan v. Sona*, 26 All. 291 (294). A deposit of mortgage-money made by the mortgagor to the credit of several persons of whom some alone were entitled to it, while others were not, would not amount to a proper deposit so as to entitle the mortgagor to the benefit of secs. 83 and 84 of this Act, inasmuch as even the persons really entitled could not draw it by themselves—*Madhavi v. Kunhi*, 23 Mad. 510; *Ganeshi Lal v. Rohini*, 50 All. 655, 108 I.C. 570, A.I.R. 1928 All. 311 (313). Even the fact that the mortgagor *bona fide* believed that the other persons were also entitled to the money, would not protect him. Under this section the question of good faith cannot arise when it is the duty of the mortgagor to deposit the money to the credit of the *real* mortgagees—*Ganeshi Lal v. Rohini*, *supra*. But the expression "mortgagee" in this section includes the legal representatives and assigns of the mortgagee. A sub-mortgage is in substance an assignment of the mortgage; a deposit by the mortgagor of the mortgage-money as payable both to the legal representatives of the deceased mortgagee and his sub-mortgagee is valid—*Subba Rao v. Ponnammal*, 46 M.L.J. 74, A.I.R. 1924 Mad. 453 (454, 455), 80 I.C. 363. See sec. 59A.

When the original mortgagee died and there was a dispute as to the persons entitled to the money, the mortgagor can deposit it to the credit of all the persons claiming the money—*Ram Sumran v. Sahibzada*, 1885 A.W.N. 328. But if the payment is made only to one of the heirs of the mortgagee, it cannot amount to a valid discharge—*Sitaram v. Sridhar*, 27 Bom. 292. Where there were two mortgagees, and the amount was deposited to the credit of the two mortgagees, but one of them was dead (or alleged to be dead, not being heard of for more than 7 years), the Court should consider whether the surviving mortgagee was alone competent to withdraw the money—*Balbhaddar v. Bitto*, 51 All. 1016, A.I.R. 1929 All. 754 (755), 118 I.C. 188.

Where the mortgagee or any one of the mortgagees is a minor incapable of receiving by himself the notice of the deposit by the mortgagor under this section, it is the duty of the latter to get a guardian *ad litem* appointed under sec. 103, and in the absence of such a guardian there can

be no valid deposit under this section—*Pandurang v. Mahadaji*, 27 Bom. 23; *Sheo Saran v. Ram Lagan*, 44 All. 64, A.I.R. 1922 All. 355, 64 I.C. 413, 19 A.L.J. 852; *Shivnath v. Manohar*, 22 I.C. 245, 16 O.C. 261; *Appu Pai v. Somu*, 49 M.L.J. 327, A.I.R. 1925 Mad. 1017, 90 I.C. 754; *Gokul v. Chandra Sekhar*, 48 All. 611, A.I.R. 1926 All. 665, 24 A.L.J. 769, 96 I.C. 1.

503. Amount of deposit:—The mortgagor must deposit the amount remaining due on the mortgage. If he deposits *more* than the amount due, the deposit is not invalid, on the principle "*omne majus continet in se minus*" (the greater includes the less)—*Wade's Case*, (1601) 5 Coke's Rep. 114; *Baikuntha v. Benode*, 29 C.L.J. 256, 51 I.C. 13; *Subramania v. Narayanaswami*, 34 M.L.J. 439, 45 I.C. 638. But if the amount deposited is less than the amount due, the mortgagee is at liberty to ignore it, and it will not have the effect of stopping interest under sec. 84, even though the deficiency is due to a *bona fide* mistake—*Gauri Sankar v. Abu Jafar*, 34 I.C. 690 (692), 3 O.L.J. 204. A deposit is held to be insufficient, even if there is a very small deficiency (*e.g.* by Rs. 2 only) and even though the deficiency is due to a miscalculation on the part of the pleader's clerk and not on the part of the mortgagor himself. In such a case, interest will not cease to run—*Debi Prasad v. Kedar*, 19 A.L.J. 582, 63 I.C. 563 (564). In one case, a deposit falling short by only nine pies owing to a *bona fide* mistake of calculation was held to be insufficient—*Subbai v. Palani*, 30 M.L.J. 607, 34 I.C. 825 (826). But in some cases it has been said that if the mortgagor tenders an insufficient amount in the *bona fide* belief that it is the whole amount due, the tender is not wholly ineffectual but is valid *pro tanto*—*Haji Abdul v. Haji Noor*, 16 Bom. 141 (147); and the mortgagee is entitled to claim interest only on the portion of the amount due which is not covered by the deposit—*Haji Abdul v. Haji Noor*, *supra*. See also *Narsingh v. Achaibar*, 36 All. 36 (39). If, however, the mortgagor making the deposit knew that it was less than what was due and admitted it, then of course the deposit of a less amount than what was due was wholly ineffectual—*Haji Abdul v. Haji Noor*, 16 Bom. 141 (149); *Dixon v. Clarke*, 5 C.B. 365; *Henwood v. Oliver*, (1841) 1 Q.B. 409. An unconditional tender (deposit) of a sum which turns out in the end to be less than what is really due may be valid *pro tanto* if there is a dispute as to the amount due, but a tender of only part of what is admittedly due is of no avail. Though a tender of a smaller amount than that of which an indivisible and entire claim consists may be invalid as a tender, there is nothing to prevent the creditor from accepting the amount tendered in part payment, and his doing so will not preclude him from afterwards claiming the residue of the amount, provided that the debtor did not make it a condition of his tender that it be accepted in discharge of the whole—*Digambar v. Harendra*, 14 C.W.N. 617 (625), 11 C.L.J. 226, 5 I.C. 165, following *Bowen v. Owen*, (1845) 11 Q.B. 130, 75 R.R. 306.

The deposit must include interest on the principal money up to the date of deposit, and the fact that the mortgagee had obtained a decree for the interest is no ground for not depositing it—*Hewanchal v. Jawahir*, 16 Cal. 307 (P.C.). The mortgagor is bound to pay interest even for the day on which he makes the deposit. If he fails to pay it, the deposit will be treated as insufficient—*Subbai v. Palani*, 30 M.L.J. 607, 34 I.C.

825. (Contra—*Raghub v. Bhobui*, 8 C.W.N. 216, where it has been held that interest cannot be charged for the day on which the money is deposited). Where the mortgagor put in a petition under this section on 3rd August, but actually deposited the money on the 10th August, the interest must be paid up to the latter date. If the interest is paid up to the 3rd August, the deposit is insufficient and invalid, and cannot stop the running of interest under sec. 84—*Mahammadunni v. Parambil*, 2 L.W. 408, 29 I.C. 145. The interest to be deposited is the original rate of interest stipulated in the bond, not the enhanced or penal rate of interest stipulated to be paid in case of default in paying the money in due time. This section does not require the deposit of an amount calculated in accordance with the penal provisions of a bond—*Ayyakutti v. Periyaswami*, 39 Mad. 579, 30 I.C. 497; *Tara Chand v. Narayan*, 18 N.L.R. 47, A.I.R. 1922 Nag. 199 (200), 65 I.C. 174; *Ram Rao v. Gopala*, 28 N.L.R. 149, A.I.R. 1932 Nag. 169.

If any interest remains due, the deposit of the principal money alone is not a valid deposit. But if the mortgage is usufructuary and the amount of the interest due has to be calculated by taking accounts of the profits under sec. 76, then until the mortgagee in possession gives accounts, the deposit of the principal money only is a valid deposit, and the interest will cease to run thereafter. But the mortgagee will be entitled to be paid the balance of interest preceding the deposit after accounting for the profits received by him—*Bhabani Charan v. Kadambini*, 33 C.W.N. 279 (281), A.I.R. 1929 Cal. 304, 119 I.C. 292.

The deposit must also include such other sums which the mortgagee is entitled to add to the mortgage money (sec. 72). This section speaks of the "amount remaining due on the mortgage" and not merely "mortgage-money" as referred to in sec. 60. The expression "amount remaining due on the mortgage" is a very wide one and covers any just allowance or costs which can be tacked on under the ordinary law of mortgage—*Nadershaw v. Shirinbai*, 25 Bom.L.R. 839, A.I.R. 1924 Bom. 264 (266), 87 I.C. 129. Thus, where the mortgagees in possession have paid the Government revenue for the mortgagor, they are entitled to treat it as part of the mortgage-money (under sec. 72), and to insist on its being deposited along with the actual mortgage-amount deposited under this section—*Anandi Ram v. Dur Najaf Ali*, 13 All. 195. But money paid by the mortgagee to avert a sale for arrears of rent under sec. 171 of the Bengal Tenancy Act does not become a part of the mortgage-money and the mortgagor is not bound to deposit it also under this section—*Manmatha v. Sarat*, 21 C.L.J. 429, 29 I.C. 929. So also, the mortgagee is not entitled to claim that the compensation or interest which is due to him by the mortgagor on account of the latter's failure to give possession should be deposited along with the mortgage-money under this section—*Allah Baksh v. Sada Baksh*, 8 All. 182; nor is the mortgagor bound to deposit the mesne profits to which the mortgagee may have been entitled owing to his being kept out of possession by the wrongful act of the mortgagor—*Rameshar v. Kanahia*, 3 All. 653 (F.B.). So again, the mortgagor need not deposit the value of improvements made by the mortgagee—*Chami v. Anu*, (1916) 1 M.W.N. 160, 32 I.C. 861.

Where during the pendency of an appeal by the mortgagee from a preliminary decree for sale, a purchaser of the equity of redemption makes a deposit under this section, the sufficiency of such deposit must be justi-

fied by the state of things at its date, irrespective of the result of the appeal—*Shib Chandra v. Lachmi*, 51 All. 686 (P.C.), 33 C.W.N. 1091 (1095), A.I.R. 1929 P.C. 243, 119 I.C. 612.

A deposit cannot be made by *instalments*. In the absence of a stipulation made between the contracting parties as to the repayment of the sum by instalments, the lender is entitled to decline to receive payment of the sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time—*Behari Lal v. Ram Ghulam*, 24 All. 461. Even if the mortgagor deposits the money in instalments, the mortgagee is not bound to accept it until the whole amount is thus deposited. Were he to accept any instalment, he would be bound to deliver up the mortgage-deed and thus lose his claim to the balance. See *Balaram v. Nanuram*, 1 C.P.L.R. 154.

504. Notice:—Until the mortgagee gets the notice under this section or the knowledge of the deposit, he has the right to sue to enforce his security. Hence where the mortgagor paid money into Court one day previous to the institution of the suit by the mortgagee, but the notice was not served on the latter before he filed his plaint, and he was unaware of the deposit at the time of filing it, *held* that he was not precluded from proceeding with the suit and obtaining a decree—*Sitaramayya v. Venkataramanna*, 11 Mad. 371.

Service of notice:—Where a mortgagor makes a deposit under this section, it is the duty of the Court to see that the notice of the deposit is duly served upon the mortgagee; it is not the business of the mortgagor to see that this is done—*Nibaran v. Parbati*, 35 C.L.J. 202, 60 I.C. 454.

Where there is a covenant in a usufructuary mortgage that the mortgagor would redeem the mortgage on the last day of Jeth (22nd June), then, if the mortgagor deposits the mortgage-money in Court, the notice must reach the mortgagee on or before the 22nd June. If, therefore, the deposit was made on the 17th June and the notice of deposit could not be issued by the Court before the 27th June, *held* that the deposit was ineffectual, and the mortgagee was entitled to possession till the last day of Jeth of the next year—*Dwarka Pershad v. Sheoambar*, 15 I.C. 592 (All.). So also, in case of an exactly similar mortgage, containing a similar covenant the mortgagor deposited the amount in Court on the last day of Jeth and notice could not therefore have been given to the mortgagee within the month of Jeth; *held* that the deposit was ineffectual, and the decree in the redemption suit brought by the mortgagor would be passed with effect from the last day of Jeth of the next year—*Saiyid Ahmad v. Dharmun*, 43 All. 424 (426), 60 I.C. 760, 19 A.L.J. 259.

505. Deposit made after suit:—A deposit under this section is invalid if made after the institution of a suit by the mortgagee for the recovery of the money due under the mortgage. The fact that the deposit was made before the mortgagor received notice of the institution of the suit does not make any difference—*Thiagaraja v. Ramaswami*, 35 M.L.J. 605, 48 I.C. 693. Even assuming that a deposit could be made after the institution of the suit, it must include the costs incurred by the mortgagee in filing the suit—*Ibid*.

A deposit is invalid if made after the filing of a suit by the mortgagee to enforce his mortgage; but a deposit made after the mortgagee brings a suit to recover possession according to the terms of the mortgage-deed

is not invalid, and the mortgagor can be allowed to redeem—*Ram Dayal v. Arjun Singh*, 50 I.C. 332 (Oudh).

If the mortgagee brings a *money suit* to recover the amount due on the mortgage and then the mortgagor pays into Court a certain sum in satisfaction of the claim, O. 24, r. 3 of the C. P. Code comes into operation, and interest on the amount deposited ceases as soon as the plaintiff receives notice of the deposit—*Thevaraya v. Venkatachalam*, 40 Mad. 804, 37 I.C. 444.

506. Effect of deposit:—The making of a deposit under this section does not *ipso facto* extinguish the mortgage where the mortgagee has *refused* to accept the deposit. If the deposit is refused, the mortgage is not extinguished, and the parties remain in the relationship of mortgagor and mortgagee to each other. It is for the mortgagor dissatisfied with the action of the mortgagee in refusing the deposit, to bring a suit for the enforcement of his legal rights; and unless and until he does so successfully, the mortgage still subsists—*Ahmadulla v. Abdul Rahim*, 45 All. 592, 74 I.C. 763, A.I.R. 1924 All. 26.

As soon as a deposit is made, interest ceases on the mortgage from that date. See sec. 84. Where a deposit is once duly made, the fact that the executors of the mortgagee have not yet taken probate and are therefore not yet qualified to withdraw the amount does not affect the mortgagor, for the interest will cease to run from the date of deposit, whether there is any one competent to accept the money or not—*Pundurang v. Dadabhoy*, 26 Bom. 643. But the case is different if the mortgagee is a minor. In such a case, it is the duty of the mortgagor making the deposit to see that a proper person is appointed as guardian (sec. 103); until he does so, he is not exempt from the payment of interest—*Pandurang v. Mahadaji*, 27 Bom. 23 (29); *Shivnath v. Manohar*, 16 O.C. 261, 22 I.C. 245; *Sheo Saran v. Ram Lagan*, 44 All. 64 (65), 64 I.C. 413, A.I.R. 1922 All. 355; *Kannu Mal v. Inderpal*, 44 All. 102 affirmed in 45 All. 273; *Gokul v. Chandra Sekhar*, 48 All. 611, A.I.R. 1926 All. 665, 96 I.C. 1.

Another effect of a deposit is that the mortgagee in possession is liable to the mortgagor to account for all the receipts of the mortgaged property, and cannot deduct any expenses incurred in connection with the property. See sec. 76 (i) and Note 473 thereunder. The deposit, unless it is accepted by the mortgagee, has not the effect of extinguishing the mortgage. Therefore a mortgagee who rejects the deposit and retains possession continues as mortgagee, but with a statutory *liability* to *account* for the profits received by him from the date of deposit. He is not then a mere trespasser but a mortgagee still holding the property as a kind of trustee for the mortgagor and as such accountable to the latter for the profit—*Rukhminibai v. Venkatesh*, 31 Bom. 527; *Ma Nyo v. Mg Hla*, 2 Rang. 382, 84 I.C. 395, A.I.R. 1925 Rang. 13. After a valid deposit by the mortgagor, the mortgagee becomes liable not only for the total amount of rents and profits actually collected by him but also for the amount left uncollected by him on account of his failure to make the best endeavours to collect them under sec. 76 (b)—*Subba Rao v. Sarvarayudu*, 47 Mad. 7 (26), A.I.R. 1923 Mad. 533, 72 I.C. 292.

If the mortgagee refuses to accept the deposit money and to give over possession of the property the mortgagor is entitled to sue for the same—*Rugad Singh v. Sat Narain*, 27 All. 178.

507. Mortgagee's right to receive the money: As soon as the

mortgagor deposits the money into Court, it is no longer his, and the mortgagee is entitled to draw the money from the Court. The mortgagor cannot object to it—*Motavengattil v. Kezatath*, 25 I.C. 369. The mortgagee's right to receive the money depends upon the compliance of certain formalities prescribed in this section *viz.*, the presenting of a verified petition, stating the amount due on his mortgage and his willingness to accept the sum deposited in full discharge of his debt, and the depositing of the mortgage-deed and other documents connected with the property in Court. (See para 2 of this section). If the mortgagee does not comply with these formalities and refuses to accept the amount, claiming a larger sum than that deposited, the money stands to the credit of the mortgagor, by whom it can be withdrawn at any time, and the Court has no jurisdiction to allow it to be attached by the creditors of the mortgagee—*Dal Singh v. Pitam Singh*, 25 All. 179. If, on the other hand, the mortgagee complies with the above formalities, the money deposited by the mortgagor becomes the property of the mortgagee so as to be liable to be attached by the latter's creditors—*Mothiar v. Ahmatty*, 29 Mad. 232.

508. Acceptance of deposit by the mortgagee—Effect:—If the mortgagee withdraws the amount deposited, the withdrawal must be deemed to have been made in *full discharge* of the mortgage-debt. Therefore he cannot withdraw the money and at the same time claim a larger sum than that deposited. Thus, where a deposit having been made under this section, the mortgagee refused to accept the money, claiming a larger sum, and after a redemption decree was passed against him, he filed an appeal similarly claiming a larger amount, but during the pendency of the appeal, applied for and withdrew the deposit amount, *held* that the mortgagee must be deemed to have received the money in full discharge of the mortgage-claim, and he had no right to prosecute the appeal in which he claimed a larger amount—*Dal Singh v. Pitam Singh*, 25 All. 179. So also, where upon a deposit made by the mortgagor, the mortgagee informed the Court that the amount deposited was insufficient, and requested the Court to require the mortgagor to deposit the balance of the amount due, but after several months the money was somehow or other drawn out by the mortgagee's agent, *held* that the money so drawn out must be held to have been drawn out in full discharge of the mortgagor's liability; that the section provided that the money lodged "in full discharge" of a liability could only be drawn out by a creditor in *full discharge* of that liability, and that it could not be assumed that the agent drew out the money in *part* satisfaction of the mortgagor's liability—*Ram Chandra v. Keshobati*, 36 Cal. 840 (P.C.). But where some money was deposited under this section for payment to a mortgagee, and on objections being raised by the mortgagees as to the insufficiency of the amount, *the mortgagor agreed to pay the balance* which was found due from him, and at the request of the pleader for the mortgagor the Court paid the money deposited to the mortgagees and endorsed payment on the back of the deed and returned it to the mortgagees; *held* that the mortgagees did not take the money in full discharge of the mortgage as provided by this section. Since the mortgagor himself admitted that the amount was not in full discharge of the debt, and thus waived one of the conditions implied by this section, he could permit the mortgagee to withdraw the money without prejudice to the latter's claim for a larger amount—*Hardayal v. Prithvi Singh*, 32 All. 142.

It has been stated before that the deposit under this section should include the sums spent by the mortgagee in possession under sec. 72 and which he can add to the mortgage-money under that section, *e.g.* Government revenue paid by the mortgagee to save the estate from sale. If, however, the mortgagor deposits only the principal and interest, without depositing the amount of revenue, and the mortgagee accepts the deposit money, gives up possession and returns the mortgage-deed, the mortgage is thereby extinguished, and the mortgagee has no longer any lien on the mortgaged property for the amount of revenue and cannot sue to recover the amount by *sale* of the property. He can only bring a simple money suit for the amount subject to the law of limitation—*Anandi Ram v. Dar Najaf Ali*, 13 All. 195.

If the mortgagee refuses to accept the money deposited, the mortgagor is entitled to withdraw the money from the Court. And if the Court gives him permission to withdraw the money owing to the mortgagee's refusal to accept it in satisfaction of his dues, it is no longer competent for the mortgagee to change his mind and to take out the money, even though it has not yet been actually withdrawn by the mortgagor. After the Court gives permission to the mortgagor to withdraw, the money is the mortgagor's money, and the tender is no longer open, so that the Court cannot direct the money to be paid to the mortgagee—*Ratna Koeri v. Nanhaki*, 4 P.L.T. 720, A.I.R. 1924 Pat. 41 (42), 73 I.C. 1053.

This section does not authorise the Court to take any security bond from any party on making payment to him of the money deposited—*Ratna Koeri v. Nanhaki*, *supra*.

84. When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender, or, *in the case of a deposit where no previous tender of such amount has been made*, as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, *and the notice required by section 83 has been served on the mortgagee*:

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal.

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to a reasonable notice before payment or tender of the mortgage-money and such notice has not been given before the making of the tender or deposit as the case may be.

Amendment:—The italicised words have been added by sec. 45 of the T. P. Amendment Act (XX of 1929). The following reasons have been stated:—

“Section 84 provides for the cessation of interest after a tender or a deposit. As a tender, if refused, is generally followed by a deposit, the case of a deposit without a previous tender ought to be distinctly mentioned.

“In I.L.R. 49 Mad. 619 it was held that if, after a reasonable time, the mortgagee, who has notice of a proper deposit, refuses to take the deposit, there is still a presumption that the mortgagor continues ready and willing to pay, and the interest does not run even if the mortgagor withdraws the deposit. In our opinion this view is not correct. It is obviously unreasonable that interest on the mortgage debt should cease to run if the mortgagor withdraws the deposit and derives benefit from the money withdrawn. We propose to add a proviso to the first paragraph of the section making it clear that where the mortgagor has deposited the amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of the withdrawal.

“In para. 3, we also propose to make it clear that if the mortgage-deed provides that reasonable notice before payment or tender of the mortgage-money is to be given to the mortgagee, the provisions of this section will not apply till such notice has been given.”—*Report of the Special Committee.*

509. Tender:—See Note 367 under sec. 60.

This section confers an exceptional privilege on mortgagors which cannot be availed of by ordinary debtors. In case of ordinary money-claims not based on mortgage, a tender before suit must be followed by payment into Court in order to stop the running of interest. But in case of mortgages, the rule is different, and a tender alone has the effect of stopping interest from the date of tender—*Arunachallam v. Govindaswami*, 55 Mad. 458, A.I.R. 1932 Mad. 109 (111), 135 I.C. 907.

A tender to be valid under this section must be made to the party entitled or to a properly authorised agent on his behalf. A tender made to a person who disclaims authority to receive it is made at the maker's risk—*Bai Ruttonbai v. Fraser Ice Factory*, 32 Bom. 521.

The tender must be made at the *mortgagee's place*, if no particular place of payment is specified in the mortgage-bond; and it is the duty of the mortgagor to seek the mortgagee out—*Mahadaji v. Pairia*, 2 N.L.R. 62. If the mortgagor asks the mortgagee to come to his (*mortgagor's*) *place* and take the money, it cannot be a valid tender—*Maung Po v. Daw Shere*, A.I.R. 1929 Rang. 271 (272).

The mortgagor gave the defendant-mortgagees notice to redeem on a certain date. To that notice the defendants replied that the deed was really one of sale and not of mortgage, but at the same time they set forth the sum which they claimed. The mortgagor never asked for further details of the defendants' claim and made no counter offer. He sued nearly two years later and did not offer any specified sum in the plaint nor paid anything in Court. *Held* that the mortgagor had made no legal tender under sec. 84, and was bound to pay interest till the date of redemption—*Budhu Ram v. Niamat*, A.I.R. 1923 Lah. 632, 75 I.C. 375, 4 Lah. 406. (This portion of the judgment is not given in 4 Lah. 406).

In order to have the effect of cessation of interest, it is necessary that the money should have been *actually produced* unless the person entitled to payment waived the condition. A mere offer by letter or notice expressing willingness to pay the mortgage-money is not sufficient—*Chetan Das v. Govind*, 36 All. 139, 12 A.L.J. 111, 22 I.C. 659; *Muhammad Mushtaq v. Bankey Lal*, 42 All. 420; *Kamaya v. Devappa*, 22 Bom. 440. In some other cases, however, it is held that actual production of the money is not necessary to constitute a tender, if the money is ready for payment; see *Pestonjee v. Hormasji*, 5 Bom.L.R. 387 cited in Note 368 under sec. 60. But at any rate, it must be shown that the mortgagor was in a position to pay the money *immediately*. Therefore a mere readiness and willingness to pay not communicated to the creditor and without the accompanying circumstances of the debtor being willing to pay immediately if the offer is accepted, does not amount to a valid tender—*Sheoratan v. Beharilal*, 45 I.C. 106 (Oudh). A telegram from the mortgagor to the mortgagee asking him to refrain from filing suit and promising to pay by a fixed date (which was *three months later*), or a subsequent telegram expressing willingness to pay and informing that the amount is ready, does not of itself constitute a valid tender. But the latter telegram immediately followed by the mortgagor's actually going to the mortgagee's place and offering the money, amounts to a valid tender—*Joti Lal v. Fateh Bahadur*, A.I.R. 1929 Pat. 397 (398). Where the mortgagor wrote to the usufructuary mortgagee asking the latter to give him an account of what was due on the mortgage, and expressed his willingness to pay what was due, whereupon the mortgagee mentioned the balance of amount due, and it was found that the mortgagor had not the money with him to make the payment, *held* that the interest on the mortgage would not cease to run under this section—*Venkataraman v. Venkata Subhadrayamma*, 34 M.L.J. 488, 45 I.C. 437. In order that a tender may be valid, it is necessary that the money should be always kept ready for payment to the mortgagee—*Jag Sahu v. Ram Sakhi*, 1 Pat. 350 (354), A.I.R. 1922 Pat. 167, 3 P.L.T. 332, 65 I.C. 666.

But actual production of the money is not necessary where the mortgagee refuses to accept it. In such a case, the readiness of the mortgagor to pay would be equivalent to sufficient tender. "Actual production of money may be dispensed with by the express declaration or equivalent act of the creditor if the tender be otherwise sufficient; so that if the debtor says that he has the sum ready in his pocket (stating the amount) and brought it for the purpose of satisfying the demand, or being in the house, offers to go and fetch it from another part of the house, but the creditor desires him not to trouble himself to produce or fetch the money as he will not take it, or if the creditor not communicating personally with the debtor refuses to authorise his agent to take the money, or to take it himself, the tender will be good." Fisher on Mortgage, 5th Edn., p. 719. Where the mortgagor had in his Bank the full amount which was due to the mortgagee, and went with his cheque-book ready to give the mortgagee a cheque, or to cash the cheque at once if the mortgagee wanted cash, but the mortgagee prevented him from doing so by refusing to have any dealings with him, *held* that there was a valid tender, and interest would cease to run—*Venkatarama v. Gopalakrishna*, 52 Mad. 322, 56 M.L.J. 255, A.I.R. 1929 Mad. 230 (231), 116 I.C. 844. In a recent Privy Council case it has been held that if a mortgagee unequivocally refuses a proposed payment of the amount due,

the mortgagor is not bound to make a formal tender of it, and the mortgagee cannot recover interest accruing subsequently, even if he proves that the mortgagor *had not the money* or the control of it—*Chalikani Venkatarayanam v. Zamindar of Tuni*, 46 Mad. 108 (116) (P.C.), 28 C.W.N. 25, 71 I.C. 1035, A.I.R. 1923 P.C. 26. “The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the bill or from the evidence it appears that the tender would have been a mere form and that the party to whom it was made would have refused to accept the money”—*per* Wigram V.C. in *Hunter v. Daniel*, (1845) 4 Hare 420. Where a valid tender of the entire amount was made, and a request was made that the mortgagee should accept what was just on accounts being taken, but the mortgagee not merely disputed the accounts but refused to make any account and rushed to Court, *held* that his conduct was such as not to entitle him to any interest accruing after the date of tender—*Joti Lal v. Fateh Bahadur*, A.I.R. 1929 Pat. 397 (399).

The Madras High Court has recently said that a tender in order to be effectual to stop running of interest must be followed by deposit in Court when the creditor sues for the money, because it is the best way in which he can prove his ability and willingness to pay—*Arunachallam v. Govindaswami*, 55 Mad. 458, A.I.R. 1932 Mad. 109 (111), 135 I.C. 907. This view was also taken by the Bombay High Court in *Haji Abdul v. Haji Noor*, 16 Bom. 141, and by the Calcutta High Court in *Rakhal v. Baikuntha*, 32 C.W.N. 1082, A.I.R. 1928 Cal. 874. But there is nothing in sec. 84 to support this proposition and the Calcutta High Court refused to accede to this view in *Gajendra v. Sita Nath*, A.I.R. 1926 Cal. 310, 90 I.C. 637. The Rangoon High Court is also of opinion that if the mortgagor asks the mortgagee to accept the mortgage-money, and the mortgagee refuses to accept it, there is a valid tender, and no interest is chargeable thereafter; and a subsequent mortgagee seeking to redeem a prior mortgage can take advantage of the tender made by the mortgagor to the prior mortgagee, and so would not be liable to pay any interest for the period subsequent to the date of such tender—*Chettyar Firm v. Chettyar Firm*, A.I.R. 1930 Rang. 255 (257), 127 I.C. 594.

A tender should ordinarily be made in current coin. A tender by cheque is not a legal tender—*Jagat Tarini v. Naba Gopal*, 34 Cal. 305. A cheque even of a man of credit is not a valid tender, and need not be accepted, but if it is once accepted, then the payee is bound by it unless it is dishonoured—*Johnstone v. Boys*, (1899), 2 Ch. 73. But whether the tender of a cheque is a valid tender or not, if the mortgagee refuses to have any dealings with the mortgagor, (*i.e.*, refuses to take payment in *any form* either in cash or in cheque), he is not entitled afterwards to say that the tender by cheque was not a valid tender. In other words, where his objection was not to the form of the payment but to payment in any form, he cannot afterwards be heard to object to the form of the payment—*Venkatarama v. Gopalakrishna*, 52 Mad. 322, 56 M.L.J. 255, A.I.R. 1929 Mad. 230 (232), 116 I.C. 844; *Jagat Tarini v. Naba Gopal*, 34 Cal. 305; *Polglass v. Oliver*, 2 Cr. & Jer. 15; *Jones v. Arthur*, 8 Dow. 422, 59 R.R. 833.

A tender cannot be made by a set-off. Thus, where the mortgagor proposed that the money due by the mortgagee to the mortgagor on another

account between them should be deducted in satisfaction of the mortgage-debt, *held* that such a proposal would not stop the running of interest—*Church v. Bishop*, 2 Ves. 371.

The tender should be of the whole amount due on the mortgage. The mortgagor may tender *more* and such a tender is not invalid—*Baikuntha v. Benode*, 29 C.L.J. 256, 51 I.C. 13. As regards a tender of a *less* amount, compare the cases cited in Note 503 under sec. 83.

A tender is not vitiated because a receipt is asked for it—*Jagat Tarini v. Naba Gopal*, 34 Cal. 305.

A mortgagee who refuses a valid tender does so at his risk, and the risk which he incurs is twofold, namely: in the first place, he has to account for all the receipts from the mortgaged property from the date of the tender (section 76, clause i), and in the second place, interest ceases to run on the principal money from the date of tender—*Satyabadi v. Harabati*, 34 Cal. 223 (228). A mortgagee in possession who has refused to give any accounts under sec. 76, cannot refuse the tender made by the mortgagor on the ground that it is less than the amount due—*Ramlal v. Narayanarao*, A.I.R. 1927 Nag. 138, 99 I.C. 630.

510. Cessation of interest:—According to the Calcutta High Court a proper tender will stop the running of interest, if the mortgagor keeps the money unemployed, *i.e.*, keeps the money always ready to pay over to the mortgagee, and does not afterwards make any profit of it—*Satyabadi v. Harabati*, 34 Cal. 223 (229); *Ram Nath v. Gopal Chandra*, 8 C.W.N. 153. See also *Jag Sahu v. Ram Sakhi*, 1 Pat. 350 (354), A.I.R. 1922 Pat. 167, 65 I.C. 666. This is also the law in England. See *Bank of New South Wales v. O'Connor*, 14 App. Cas. 273; *Geyles v. Hall*, 2 P. Wms. 377. The Madras High Court has however drawn a distinction between a tender and a deposit, and holds that in case of a tender it is not necessary that the money should be always kept ready for payment; therefore where after making a tender which was refused by the mortgagee the mortgagor employed the money to other uses, and was afterwards unable to pay, *held* that the interest ceased to run from the date of tender—*Velayudu v. Hyder Hossein*, 33 Mad. 100.

The interest on the principal money ceases when the mortgagor has duly made a deposit of *all* that is due on the mortgage. If at first he had deposited an inadequate amount, and subsequently made a further deposit paying off all that was due, interest would cease only from the latter date—*Deo Dat v. Ram Autar*, 8 All. 502. The tender or deposit of a less amount, even if made under a *bona fide* mistake does not stop the running of interest—*Gaurishankar v. Abu Jafar*, 3 O.L.J. 204, 34 I.C. 690; *Subbai v. Palani*, 30 M.L.J. 607, 34 I.C. 825. (In two earlier cases of Bombay and Allahabad High Courts, however, a deficient deposit made under the *bona fide* belief that it was the whole amount due, was held to be valid *pro tanto* and the interest also ceased *pro tanto*—*Haji Abdul v. Haji Noor*, 16 Bom. 141; *Narasingha v. Acchaibar*, 36 All. 36). But where a mortgagor brought into Court the whole sum found due by the Court of first instance, and upon an appeal by the mortgagee, the Appellate Court determined a larger sum to be due: *held* that the sum deposited operated as payment *pro tanto* and interest would cease to that extent—*Digambar v. Harendra*, 14 C.W.N. 617, 11 C.L.J. 226, 5 I.C. 165.

There is a diversity of opinion as to whether interest ceases from the day of deposit, or whether the mortgagee is entitled to interest for

that day also. According to the Calcutta High Court, interest cannot be charged for the day on which the money was deposited—*Raghub v. Bhobui*, 8 C.W.N. 216. But the Madras High Court is of opinion that the mortgagor at the time of making the deposit under sec. 83 must include in the amount deposited the interest for the day of deposit also—*Subbai v. Palani*, 30 M.L.J. 607, 34 I.C. 825.

Effect of withdrawal of deposit:—In order that a deposit may have the effect of cessation of interest, it is necessary that the money must be always kept in Court; and if the mortgagor subsequently *withdraws the money*, on the mortgagee's refusal to accept the amount deposited, interest will again commence to run—*Krishnaswami v. Ramaswami*, 35 Mad. 44 (45), 8 I.C. 763; *Thevarayya v. Venkatachalam*, 40 Mad. 804 (806), 37 I.C. 444; *Debi Sahai v. Narayan*, 3 O.W.N. 942, A.I.R. 1927 Oudh 103, 99 I.C. 147.

This is now clearly laid down in the new *proviso*. A Full Bench of the Madras High Court had dissented from the above view and had observed: "The only question properly arising was whether the mortgagor, notwithstanding his withdrawal, remained ready and willing to pay throughout. The better opinion seems to be that the fact of the tender (deposit) raises the presumption that the debtor continued ready and willing to pay, and that the burden is cast upon the creditor to show that the debtor was either not willing to pay or not able to pay because he had utilized the money for other purposes"—*Ramabhadra v. Arunachalam*, 49 Mad. 609 (F.B.), 95 I.C. 108, A.I.R. 1926 Mad. 601. See also the opinion of Phillips, J., in *Thevarayya v. Venkatachalam*, 40 Mad. 804 (808). The Allahabad High Court held that where the full amount due on a mortgage was paid into Court, and notice was properly issued, and the mortgagee appeared but definitely refused to accept the amount whereupon the mortgagor withdrew it out of Court, the interest ceased to run from the date of deposit as the mortgagor had done all that could be done under this section—*Hukam Singh v. Babu Lal*, 44 All. 198 (200), 64 I.C. 971, A.I.R. 1922 All. 181. But these rulings are no longer correct.

511. "Mortgagor has done all that has to be done":—The Legislature has drawn a distinction between the case of a tender and the case of a deposit as to the date from which interest shall cease to run. In the case of a tender, interest shall cease from the date of the tender; but in case of a deposit, the interest only ceases when the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of Court; that is to say, he must do something more than make a deposit—*Pandurang v. Mahadaji*, 27 Bom. 23 (27). But neither this section nor sec. 83 states expressly what are all the things that the mortgagor has to do—*Krishnasami v. Ramasami*, 35 Mad. 44 (45).

A mortgagor is not liable to pay interest for future after he has deposited the money and taken all the steps necessary to pay the money to the person entitled to it, and if through the fault of the person or persons entitled to it, it is not clear exactly to whom the money is to be paid, the mortgagor cannot be deprived of the right conferred on him by this section on account of the omissions and errors of such persons—*Harihar v. Sheo Singh*, 19 O.C. 145, 36 I.C. 814. Where the mortgagor deposited the sum due in Court and did all he could to enable the mortgagee to draw the amount, but the same was not done because of a dispute among the mortgagee's heirs, interest ceased to run from the date of de-

dopsit—*Nagathal v. Arumugan*, 44 M.L.J. 362, 79 I.C. 40, A.I.R. 1923 Mad. 354; *Baluswami v. Krishnaswami*, A.I.R. 1924 Mad. 559, 46 M.L.J. 497, 84 I.C. 698. Where the mortgagor deposited the money in Court as payable to the mortgagee and his sub-mortgagee, the mortgagor did all that was required to be done to enable the mortgagee to receive the money, and the mortgagor would not suffer if by reason of disputes between the mortgagee and his sub-mortgagee as to the right to the money, the money was not paid to anybody but remained in Court—*Subba Rao v. Ponnammal*, 46 M.L.J. 74, A.I.R. 1924 Mad. 453 (455), 80 I.C. 363. Where the mortgagor paid the money into Court and issued notices to the four sons of the mortgagee, but before all of them could be served, he requested the Court to dismiss the petition, *held* that the mortgagor had not done all that had to be done to enable the mortgagee to take the amount, and interest did not therefore cease to run—*Venkateswaradu v. Bala Tripurasundari*, 1915 M.W.N. 763, 30 I.C. 769. Where the mortgagee was dead, and the mortgagor, being unable to ascertain as to who were the persons entitled to succeed, deposited the mortgage-money in Court, but withdrew it before the rightful heirs were ascertained, he could not be said to have done all that he could do to enable the heirs to receive the money. In such a case the mortgagor could not claim cessation of interest—*Thevarayya v. Venkatachalam*, 40 Mad. 804 (807), 37 I.C. 444. Where the mortgagee is a minor, it is the duty of the mortgagor making a deposit to apply for the appointment of a guardian *ad litem* for the purpose of receiving notice of the deposit and taking the money out of Court, and to see that a guardian *ad litem* is appointed (see sec. 103). Until he does so, it cannot be said that he has done all that has to be done to enable the mortgagee to take the money out of Court—*Pandurang v. Mahadaji*, 27 Bom. 23 (29). Where a mortgagor deposited money in Court and joined a minor mortgagee as a party with a major mortgagee, but he failed to see that the minor was properly represented by the appointment of a guardian, in order that the Court might be able to order the money to be paid, *held* that the mortgagor had not performed what the law requires to be performed when a deposit is made under sec. 83, and that the deposit was not a valid deposit—*Appa Pai v. Somu*, 49 M.L.J. 327, 90 I.C. 754, A.I.R. 1925 Mad. 1017. Where two of the mortgagees being minors, the mortgagor, after depositing the amount in Court, applied for appointment of guardians *ad litem* for those minors under sec. 103, and proposed the names of two guardians, and after much difficulty notices were served on them and they were ultimately appointed guardians, *held* (*per* Lindsay, J.) that the interest ceased to run only from the date when the Court finally appointed the guardians, and not from any earlier date, for it was not till the mortgagor had taken all the steps necessary to procure the appointment of guardians and the Court had duly appointed guardians for the minors that the mortgagor could be said to have done all that had to be done to enable the (minor) mortgagees to take the amount out of Court—*Kannu Mal v. Inderpal*, 44 All. 102, (107, 108), 64 I.C. 907, A.I.R. 1922 All. 147, affirmed on appeal in *Kannu Mal v. Inderpal*, 45 All. 273, A.I.R. 1923 All. 183, 71 I.C. 278.

Service of notice:—The amendment made at the end of the 1st para requires that notice of the deposit should be served on the mortgagee. It was formerly held that when the mortgagor deposited in Court the amount due upon the mortgage and paid *batta* for the notice with the

proper address of the mortgagee, he had done all that had to be done by him, and interest ceased to run thereafter—*Subbai v. Palani*, 30 M.L.J. 607, 34 I.C. 825, and the fact that the notice was not actually served on the mortgagee till after a long time, was no fault of the mortgagor; because the duty of getting the service of notice effected on the mortgagee was no part of the duty of the mortgagor. As soon as he applied for the issue of notice to the mortgagee, and gave the correct address, he had done all that could be done to enable the mortgagee to take the money out of Court, and interest ceased to run therefrom—*Pandit Jiva Ram v. Thakurain Khem Koer*, 70 I.C. 811, A.I.R. 1923 All. 24. But this view is no longer correct. Under the present section notice must be *actually served* upon the mortgagee, before interest will cease to run.

85 to 90.—[*Repealed by Act V of 1908.*]

See Rules 1—6 of O. XXXIV, C. P. Code, printed in the Appendix.

Redemption.

91. Besides the mortgagor,
Who may sue for redemption. any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property:—

- (a) Any person (other than the mortgagee of the interest sought to be redeemed) having any interest in, or charge upon the property;
- (b) any person having any interest in, or charge upon, the right to redeem the property;
- (c) any surety for the payment of the mortgage-debt or any part thereof;
- (d) the guardian of the property of a minor mortgagor on behalf of such minor;
- (e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot;
- (f) the judgment-creditor of

91. Besides the mortgagor,
Persons who may sue for redemption. any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:—

- (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged, or in or upon the right to redeem the same;
- (b) any surety for the payment of the mortgage-debt or any part thereof; or
- (c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property;

(g) a creditor of the mortgagor who has in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

Amendment:—This section has been redrafted by sec. 46 of the T. P. Amendment Act (XX of 1929). The old clauses (a) and (b) have been combined into one clause (a); old clauses (c) and (g) are now clauses (b) and (c) respectively; and the old clauses (d), (e) and (f) have been omitted. The reason is stated as follows:—

“Section 91 specifies persons who, in addition to a mortgagor, are entitled to redeem. Clauses (a) and (b) can be suitably combined in one clause. Clauses (d) and (e) are superfluous, and, in our opinion, should be omitted.

“An attachment does not create any interest such as a charge or a lien in the property attached (I.L.R. 29 Cal. 428; 32 Mad. 429), and there is no reason why an attaching creditor should have the right of redemption. We, therefore, propose to omit clause (f).”—*Report of the Special Committee.*

512. Clause (a)—Persons having interest in or charge on the right to redeem:—This section is not confined to persons who have an interest in the property, but extends also to persons having any interest in the right to redeem the property. So, a sub-mortgagee may redeem. Thus, where a sub-mortgagor left a portion of the consideration money in the hands of the sub-mortgagee for redeeming a prior mortgage in respect of the property, the sub-mortgagee was entitled to redeem the prior mortgage—*Ramsubhag v. Nursingh*, 27 All. 472. A subsequent mortgagee is entitled to redeem a prior mortgage—*Gobinda Menon v. Chathu Menon*, 22 I.C. 907; *Radhabai v. Shamrav*, 8 Bom. 168. See sec. 92.

A landlord has no such interest as would entitle him to redeem a mortgage of his holding made by a tenant—*Ganpat v. Bhangji*, 15 C.P.L.R. 175. But in U. P., if a fixed-rate tenant dies without heirs, the tenancy comes to an end and the land goes back to the Zemindar. Therefore a Zemindar has a right to redeem a mortgage of the holding made by a tenant at fixed rate who has died without heirs—*Tulshi Ram v. Gurdial*, 33 All. 111 (F.B.) (overruling *Ramdiyal v. Maharaja of Vizianagram*, 30 All. 488). See also 1932 A.L.J. 474 cited in Note 513 below.

The word ‘interest’ is not necessarily confined to rights of ownership but is sufficiently large to include any minor interest such as that of a *tenant*. A varumpattom tenant in Malabar claiming under a lease executed by the ottidar is entitled to redeem the prior kanom—*Paya Mutashii v. Kovamel Amina*, 19 Mad. 151.

Where the mortgagor's equity of redemption happens to have vested

by purchase in a person who is also a prior mortgagee, and that person as owner of the equity of redemption wants to redeem a puisne mortgage, while at the same time the puisne mortgagee wants to redeem the prior mortgage, the claim of the prior mortgagee, not as a prior mortgagee but as owner of the equity of redemption, will be preferred—*Ram Baran v. Bhagwati*, 47 All. 751, 89 I.C. 295, A.I.R. 1925 All. 804 (807).

513. Persons having interest in or charge on property:—It is a general principle that no person is entitled to redeem unless he can show a title to the estate of the mortgagor. The person claiming redemption must prove that he has an interest in it—*Dam Dihal v. Maharaja of Vizianagram*, 30 All. 488. A person claiming to be the heir of the original mortgagor is not entitled to redeem unless he is the heir according to the law of inheritance applicable to the property. Thus, the brothers and nephews are not heirs to an occupancy holding under sec. 9 of the U. P. Tenancy Act, 1881, if they did not share in the cultivation jointly with the deceased, and they cannot redeem the mortgage of the holding created by the deceased—*Ram Singh v. Baldeo*, 1932 A.L.J. 605, A.I.R. 1932 All. 643 (647). This clause refers to a person having an interest in or charge upon the property which is affected by the mortgage, and a *raiya* interest is not such an interest. Consequently the purchaser of a *raiya* interest in the mortgaged property is not entitled to redeem it—*Girish Chandra v. Juramani*, 5 C.W.N. 83. Clauses (a) and (b) of sec. 91 do not cover the interest in property held by a tenant or yearly lessee to whom it is given for cultivation; such a tenant or lessee has no right to redeem the property—*Kalu Singh v. Hansraj*, 78 I.C. 47, A.I.R. 1925 Oudh 270 (271). But the permanent lessee of the mortgagor has the right to redeem—*Raghunandan v. Ambika*, 29 All. 679; *Shankar v. Hukumchand*, 14 N.L.R. 117, 47 I.C. 99. The Nagpur Court is of opinion that even a lessee for a term of years is a person having an interest in the property and is entitled to redeem—*Pannalal v. Rajaram*, 23 N.L.R. 128, A.I.R. 1926 Nag. 496, 96 I.C. 973; *Ghulam Nabi v. Kanhai*, 16 N.L.R. 180, 50 I.C. 511; *Sheoram v. Jamnabai*, 19 N.L.R. 18, A.I.R. 1923 Nag. 273.

On the death of a tenant or sub-tenant without heirs, his right reverts to the landlord and does not escheat to the Crown. It is open to the landlord in such a case to redeem a mortgage made by the tenant or sub-tenant—*Tulsi Ram v. Gur Dayal*, 33 All. 111; followed in *Arjun Singh v. Maheshanand*, 1932 A.L.J. 474, A.I.R. 1932 All. 437 (438), 138 I.C. 366. An exproprietary tenant has a right of redemption under this clause. Thus, the owner of certain *sir* plots executed an usufructuary mortgage, and afterwards his proprietary rights were sold and purchased by the defendants, who subsequently acquired the mortgagee-rights also. The mortgagor then brought the present suit for redemption. *Held* that upon the sale of the proprietary rights, the mortgagor became entitled to occupy the *sir* lands as exproprietary tenant, and as such he had an "interest in the property," which enabled him to redeem the mortgage—*Mahomed Husain v. Hanuman*, 16 A.L.J. 796, 47 I.C. 861.

Where there are several mortgagors, each and every one of the mortgagors is interested in the payment of the mortgage-money and the redemption of the mortgaged estate, and each and every one of them has a right by payment of the money to redeem the entire estate, seeking contribution from others—*Norender v. Dwarka Lal*, 3 Cal. 397 (P.C.); *Pearce v. Morris*, L.R. 5 Ch. 227. Under this section, the smallest interest

in the equity of redemption will entitle a person to redeem, and he is entitled (and bound) to redeem the whole property. So, an owner of a *portion* of the equity of redemption is entitled to redeem the entire property—*Shankar v. Bhikaji*, 53 Bom. 353, 116 I.C. 225, A.I.R. 1929 Bom. 139 (141); *Fakir Chand v. Babu Lal*, 39 All. 719 (721); *Rugad Singh v. Sat Narain*, 27 All. 178 (182); *Baikantha v. Mahesh*, 22 C.W.N. 128 (129), 44 I.C. 77; *Pratap Chandra v. Peary Mohan*, 22 C.W.N. 800 (802), 48 I.C. 669; *Huthasanam v. Parameshwaran*, 22 Mad. 209 (211). A person who has purchased a portion of the equity of redemption is entitled to sue for redemption of the whole mortgage—*Nainappa v. Chidambaram*, 21 Mad. 18 (26); *Huthasanam v. Parmeshwaran*, 22 Mad. 209 (212); *Yadalli v. Tukaram*, 48 Cal. 22 (28) (P.C.); *Shankar v. Bhikaji*, *supra*. But where the mortgage has been split up by the act of the mortgagee, neither a co-mortgagor nor a transferee from him can redeem more than his share of the mortgaged property. See this subject discussed in Note 376 under sec. 60. The purchaser of the right, title and interest of the mortgagor in the mortgaged property at an execution sale is entitled to redeem the mortgage—*Periandi v. Angappa*, 7 Mad. 423; *Radha Kishun v. Hem Chandra*, 11 C.W.N. 495. So also, a purchaser *pendente lite* from the mortgagor is entitled to redeem—*Har Sankar v. Sheo Gobind*, 26 Cal. 966; *Sheo Narain v. Chunilal*, 1900 A.W.N. 51. Where a prior mortgagee purchases the mortgaged property in execution of a decree obtained by him in a suit to which the puisne mortgagee was not a party, he is entitled to redeem the puisne mortgage—*Dhanvanti v. Hargobind*, 3 Pat. 435 (441) following *Devendra Nath v. Ram Taran*, 30 Cal. 599 (F.B.). Where a puisne mortgagee fails to implead in a suit on his mortgage a prior mortgagee who has purchased a part of the property in satisfaction of his own mortgage, the latter is entitled to redeem the puisne mortgage so far as it affects the part of the property purchased by him—*Birinchi v. Saroda*, 3 Pat. 114 (118), 5 P.L.T. 95, A.I.R. 1924 Pat. 452.

A member of a Hindu family who has merely a personal right to maintenance, has no charge on the property within the meaning of this clause; consequently he is not entitled to redeem a mortgage made by an owner of the estate—*Balwant Singh v. Roshan Singh*, 18 All. 253. A daughter-in-law of a Hindu entitled to maintenance has not such an interest in the family property within the meaning of this section as would entitle her to redeem—*Gajadhar v. Thula*, 12 O.C. 37 (39), 1 I.C. 690. But if a charge for maintenance has been obtained on the property by a contract or decree, it will then enable the charge-holder to exercise the right of redemption—*Roshan Singh v. Balwant*, 22 All. 191 (P.C.).

Under Malabar law, except in very special circumstances where the karnavan is proved to be guilty of gross misconduct and collusion, it is not competent to the junior members of a tarwad to sue for redemption of a Kanom granted by their Karnavan—*Soopi v. Mariyoma*, 43 Mad. 393.

A person in whose favour there is only an agreement to sell immoveable property has no interest in the property, and is consequently not entitled to file a suit for redemption of that property—*Mayappa v. Kolandaivelu*, 1926 M.W.N. 459, A.I.R. 1926 Mad. 597 (598), 92 I.C. 715.

A person having an inchoate right may not redeem until the completion of his title, but if a person whose title is to some extent imperfect seeks to redeem, and is able to prove a perfect title at the hearing of his case, he should have a right to redemption—*Krishnaji v. Ganesh*, 6 Bom. 139; *Tukaram v. Satvaji*, 5 Bom. 206 (207).

A mortgagor who subsequently parts with the equity of redemption in the mortgaged property in favour of a third party by a sale-deed which reserves part of the consideration with the vendee is nevertheless entitled to redeem the mortgage—*Ratnam Pillai v. Kamalambal*, 48 M.L.J. 213, 86 I.C. 793, A.I.R. 1925 Mad. 778. A mortgagor who has conveyed the land subject to the mortgage and has expressly reserved a lien for the purchase money may redeem by virtue of such interest—*Jones on Mortgages*, Vol. 2; § 1056.

The interest referred to in this clause is a *present* interest, i.e., an interest in existence at the time the suit is instituted, and not a mere contingent interest such as a reversioner possesses—*Ramchandra v. Kallu*, 30 All. 497. And so, a person who has absolutely no present interest at all, e.g., a *reversioner*, is not entitled to redeem during the life time of the widow—*Ram Chandar v. Kallu*, 30 All. 497; *Narayana v. Pechiammal*, 36 Mad. 426 (435). (Contra—*Gumani v. Chakkar*, 8 O.C. 349, and *Basavan v. Natha*, 1 O.W.N. 319, 82 I.C. 747, A.I.R. 1925 Oudh 30, at p. 33, where a reversioner was held to be entitled to redeem during the widow's lifetime). But although a reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder, still if a suit is instituted by the mortgagee for sale, a reversioner has sufficient interest in the property to entitle him to discharge the mortgage to prevent loss of the property to which he would be entitled to succeed on the death of the widow. In such a case, the reversioner would be entitled to be reimbursed by the widow under sec. 69, Contract Act, in respect of the money paid—*Narayana v. Pechiammal*, 36 Mad. 426 (436).

A sub-mortgagee has both an interest in and charge on the mortgaged property. He is therefore entitled to redeem—*Venkatanarayanamsami v. Kani*, 1913 M.W.N. 903, 21 I.C. 560; *Muthi v. Venkatachellam*, 20 Mad. 35; *Ram Subhag v. Nursingh*, 27 All. 472.

514. Clause (b): Surety:—The right of the surety to redeem is a part of his general right as surety as defined in secs. 140 and 141 of the Indian Contract Act. When a surety has paid off the debts of the principal debtor, he stands in the place of the original creditor and can proceed against the mortgagor upon the mortgage-deed, and can use against the latter every remedy which the original creditor himself could have used—*Heeralal v. Syud Oozir*, 21 W.R. 347 (348); *Graythorn v. Swinburn*, 14 Ves. 160; *In re Wrexham*, (1899) 1 Ch. 440; *Nicholas v. Ridley*, (1904) 1 Ch. 192.

Attaching Judgment-creditor:—Under the old clause (f) a judgment-creditor (money-decree-holder) of the mortgagor, when he obtained execution by attachment of the mortgagor's interest in the property, was entitled to redeem—*Lakhpatt v. Fakiruddin*, 39 All. 536, 41 I.C. 190; *Ghulam Husain v. Dinanath*, 23 All. 467; *Venkata v. Venkataramayya*, 37 Mad. 418; *Meghraj v. Kesho Gopal*, A.I.R. 1923 Nag. 311, 73 I.C. 8. So also, the person who purchased the mortgaged property at the sale held in execution of that creditor's decree was entitled to redeem—*Lakhpatt v. Fakiruddin*, 39 All. 536. But a contrary view was taken in *Peacock v. Madan Gopal*, 29 Cal. 428 and *Zemindar of Karvetnagar v. Tirumalai*, 32 Mad. 429. But if, subsequent to the attachment by the decree-holder, the mortgagee filed a suit upon his mortgage (whether with or without impleading the attaching decree-holder, it is immaterial) and brought the mortgaged property to sale, held that the right to redeem conferred on the decree-holder by the

old clause (f) ceased to be available to him after the property had been sold away in execution of the mortgage-decree—*Subramanian v. Sinnammal*, 53 Mad. 881, 59 M.L.J. 634, A.I.R. 1930 Mad. 801 (807), 127 I.C. 624; *Veyindra v. Mayanadan*, 43 Mad. 696.

Under the present section the right of the judgment creditor to redeem has been taken away under all circumstances. For reason see the *Report of the Special Committee*, cited *ante*. See also *Subramanian v. Sinnammal*, *supra*. An attaching creditor does not, by reason of the attachment obtain any lien or charge on the attached property, and therefore he cannot hand on any such charge to the auction-purchaser; nor can he retain in himself the right to redeem by purchasing the property himself at such auction—*Kiernander v. Benimadhab*, 58 Cal. 598, 134 I.C. 561, A.I.R. 1931 Cal. 763 (770), dissenting from 39 All. 536.

Subrogation.

74. Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire in respect of the property, all the rights and powers of the mortgagee as such, to whom he has made such tender.

92. Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated.

Nothing in this section shall

be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

Amendment:—This section has been redrafted by sec. 47 of the T. P. Amendment Act (XX of 1929) for the following reasons:—

“As stated before, sections 74 and 75 of the Act are based on what is known as the principle of subrogation. The principle can come into operation either by act of parties, *e.g.*, by assignment of the debt, or by operation of law, but, technically, the term ‘subrogation’ is confined to cases where the right arises by operation of law. In Roman Law, a creditor, who lent money to the debtor for the purpose of paying off a mortgage on condition that he was to be substituted in the place of the mortgagee, was entitled to claim the benefit of the security discharged with his money (*see* Donatt’s Civil Law, section 1774; *see* also Hunter’s Roman Law, pp. 441 and 443); and this right has been recognised in all modern systems derived from Roman Law. Section 74 is confined to the case when a subsequent mortgagee pays off a prior mortgagee. The rule contained in the section is really covered by section 75, but both those sections apply only to the case of a subsequent mortgagee. The principle of subrogation, however, ought to apply generally to all cases other than those of a mortgagor who pays off his own debt or of a mere volunteer. In *Bisseswar Prasad v. Lala Sarnam Singh*, 6 C.L.J. 134, at pp. 137-38, it is observed as follows:—

‘The doctrine of subrogation is a doctrine of equity jurisprudence. It does not depend on privity of contract, express or implied, except in so far as equity may be supposed to be imported into the transaction, and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case, and on the principles of natural justice. While, therefore, the doctrine will be applied in general wherever any person other than a mere volunteer pays a debt or a demand, which in equity or good conscience should have been satisfied by another or where the liability of one person is discharged out of a fund belonging to another, or where one person is compelled for his own protection or that of some interest which he represents, to pay a debt for which another is primarily liable, or wherever a denial of the right would be contrary to equity and good conscience, the doctrine will never be permitted where the application of it would work injustice to the rights of those having equal or superior equities.’

“In our opinion, all persons who have an interest in the mortgaged property or in the right of redemption, except the mortgagor, that is, all those who are referred to in section 91 as having the right of redemption, should be entitled to be subrogated to or substituted in the place of the creditor who is paid off. We think proper to omit sections 74 and 75 and to provide in this new section 92 for the principle of subrogation.”—*Report of the Special Committee.*

Thus the present section is more comprehensive than the old section

which applied only to the case of a subsequent mortgagee redeeming a prior mortgage.

515. Subrogation:—Curiously enough, the word “subrogation” was not to be found within the four corners of the Transfer of Property Act, and has been for the first time introduced by the Amendment Act of 1929.

This section enacts the rule of subrogation which means substitution by operation of law of the rights and interests of the mortgagee in the land. According to this rule a person interested in the discharge of an incumbrance is entitled to discharge it, and he becomes thereupon subrogated, *i.e.*, entitled to all the remedies open to the person whom he has paid off.

Subrogation is of two kinds—(a) legal and (b) conventional. *Legal* subrogation takes place when the mortgage-debt is paid off by some person who has some interest to protect, as for instance where the puisne mortgagee satisfies a prior incumbrance; whereas *conventional* subrogation takes place where the person who pays off the debt has no interest to protect but he advances the money under an agreement express or implied that he would be subrogated to the rights and remedies of the creditor. See *Gurdeo Singh v. Chandrika Singh*, 36 Cal. 193 (217-219) where the subject is fully explained; *Sohan Lal v. Jot Singh*, 16 O.C. 148, 20 I.C. 458.

No right of mortgagor:—The words “other than a mortgagor” show that it is only when the subsequent mortgagee or the other persons mentioned in this section redeem a prior mortgage that the question of subrogation arises; the doctrine has no application where the *mortgagor* himself redeems it. The mortgagor discharging a prior debt is not entitled to be subrogated to the rights and remedies of his creditor. Only such persons are entitled to the benefit of the rule who discharge a debt for which they are not primarily liable. The right is denied to the mortgagor because in discharging a prior incumbrance created by himself he merely performs his own obligation to his creditor—*Narain v. Narain*, 52 All. 1037, A.I.R. 1931 All. 40 (42), 1930 A.L.J. 1577; *Md. Mohsen v. Md. Abid*, 22 O.C. 72, 52 I.C. 159. The right of subrogation can be claimed only by a person who, though he is not primarily liable to discharge a debt, discharges it for his own protection, or at the request of the party ultimately bound; it cannot be claimed by the mortgagor or by any person who has assumed the payment of the mortgage-debt without having any interest to protect—*Sibananda v. Jagmohan*, 1 Pat. 780 (783), A.I.R. 1922 Pat. 499, 3 P.L.T. 533, 68 I.C. 707.

This section has no *retrospective* effect, so as to give a right of subrogation to a stranger or volunteer who had paid off a mortgage before the present Amendment came into force—*Pichaiyappa v. Gorindarajulu*, 33 L.W. 78, 130 I.C. 506, A.I.R. 1931 Mad. 110 (111). But with regard to a co-mortgagor or to a subsequent mortgagee paying off a prior mortgage this section will have retrospective effect, because it does not introduce any new principle, but has simply enunciated in a definite form the law which was previously followed by the Courts. See *Jairam v. Bhilaji*, 27 N.L.R. 152, A.I.R. 1930 Nag. 300; *Tota Ram v. Ram Lal*, 54 All. 897 (F.B.), A.I.R. 1932 All. 489 (492), 139 I.C. 107.

Persons who are entitled to the right:—

516. Subsequent Mortgagee:—Where a subsequent mortgagee seeks to redeem a prior mortgage, it is necessary that the prior mortgage must be subsisting at the time. If both mortgages are usufructuary, the

two cannot subsist at one and the same time, and no question of redemption of the prior mortgage arises. So also, this section does not come into operation where the language of the second mortgage clearly shows that the intention of the parties was to *extinguish* the prior mortgage by the execution of the second—*Koopmia v. Chidambaram*, 19 Mad. 105 (107); or where it is clear that the first mortgage has been extinguished and satisfied out of the money raised by the second—*Wilayet Hussain v. Karam Hussain*, 12 O.C. 185, 3 I.C. 590. A second mortgagee's right to redeem the prior mortgage is in its nature a right to consolidate the two securities into one as against the mortgagor and to hold them together until they are redeemed, and there can be no right to consolidate when the first security ceases to exist by payment or by a Court sale which extinguished the first mortgage—*Perumal v. Kaveri*, 16 Mad. 121.

A subsequent mortgagee can redeem a prior mortgage without redeeming an intermediate mortgage. Thus, in a case where a property is subject to three mortgages (*e.g.*, in 1911, 1912 and 1913) the third mortgagee (under the mortgage of 1913) can redeem the first mortgage of 1911, without redeeming the second mortgage of 1912, and can acquire the rights of the first mortgagee, and he can thus insist on his being treated as first mortgagee whose mortgage must be paid off before the second mortgagee brings the mortgaged property to sale—*Tota Ram v. Ram Lal*, 54 All. 897 (F.B.), A.I.R. 1932 All. 489 (491); *Chhote Lal v. Bansidhar*, 24 A.L.J. 570, 95 I.C. 998, A.I.R. 1926 All. 653; *Duber v. Ram Sahai*, 10 O.L.J. 305, A.I.R. 1924 Oudh 56 (59), 79 I.C. 654. That is, a subsequent mortgagee redeeming a first mortgage is subrogated to the rights of the first mortgagee and has priority over intermediate incumbrances subsequent to the first mortgage; and this rule equally applies if the subsequent mortgagee is the *same person* as the first mortgagee. On principle it makes no difference whether the money raised by the subsequent mortgage is applied in satisfaction of an earlier mortgage of a third person or in satisfaction of an earlier mortgage of the *subsequent mortgagee himself*—*Kanhaiya Lal v. Gulab Singh*, 7 Luck. 655, A.I.R. 1933 Oudh 9 (12).

A subsequent mortgagee when he sues for redemption of a prior mortgage acts on his own behalf as a mortgagee and not as an agent of the mortgagor. The payment made by him cannot be considered to be a payment on behalf of the mortgagor, and consequently he is entitled to subrogation—*Raghunandan v. Ajodhya*, 1931 A.L.J. 214, A.I.R. 1930 All. 869 (871), 129 I.C. 378. But a subsequent mortgagee paying off a prior mortgage *at the request* of the mortgagor or out of the money left in his hands for that purpose, acts as the agent of the mortgagor and is not entitled to subrogation. See the cases under heading "*Mortgagor's Agent*" in Note 518A, *infra*.

When a subsequent mortgagee redeems a prior mortgage, no question arises as to whether the payment is for the benefit of the mortgagor or of the mortgagee. All that one has to see in applying this section is whether the person claiming its benefit was a mortgagee at the time of his payment. Even where the mortgagee has agreed to purchase the mortgaged property, the payments made by the mortgagee to pay off prior mortgages can be availed of under this section—*Nagayyar v. Govindayyar*, 17 L.W. 14, 70 I.C. 286, A.I.R. 1923 Mad. 349.

The property against which the subsequent mortgagee may enforce his right of subrogation is the property existing at the time of redemption,

and not the property originally mortgaged to the prior mortgagee. Where part of the property comprised in the prior mortgage ceased to be subject to that mortgage (having been released by the prior mortgagee) at the time when the subsequent mortgagee redeemed that mortgage, *held* that the subsequent mortgagee could claim to recover his money not by sale of the entire property which existed at the date of the first mortgage, but only such property which existed at the time of his redemption. In other words, he cannot acquire any higher right than that of the prior mortgagee whom he redeems—*Md. Mahmud v. Kalyan Das*, 18 All. 189.

If the subsequent mortgagee redeems more property than given to him by the terms of his own mortgage-deed, he is entitled to retain possession of it in subrogation to the rights of the mortgagee redeemed by him till a proportionate amount is paid to him by those interested in the property other than that to which he is entitled under his own mortgage-deed—*Raghunandan v. Ajodhya*, 1931 A.L.J. 214, A.I.R. 1930 All. 869 (871), 129 I.C. 378.

Where a puisne mortgagee pays off a prior mortgage-decree, he acquires all the rights and powers of the prior mortgagee including the right to get the interest. The puisne mortgagee, like the prior mortgagee, is not debarred by the rule of *damdupat* from getting interest in excess of *damdupat* after the date fixed for payment, *e.g.*, compound interest at the rate prescribed by the mortgage-decree—*Narayan v. Nathmal*, 17 N.L.R. 200, A.I.R. 1922 Nag. 155 (156), 65 I.C. 275.

A second or subsequent mortgagee redeeming a prior mortgage becomes possessed of the same powers as the prior mortgagee. But it is not necessary for him to take an assignment of the rights which he acquires from the prior mortgagee, the assignment being implied by law—*Bissessur v. Lala Sarnam Singh*, 6 C.L.J. 134. Therefore, if a second mortgagee pays off the prior mortgage without obtaining an assignment of the mortgage or without getting a receipt for the amount paid, but in lieu thereof obtains the actual mortgage-deed, he is entitled to the benefit of this section, and has the right to sue for the amount due under the first mortgage—*Narayan v. Posha*, 45 Bom. 1112 (1120), 62 I.C. 477 (479), following *Mahomed Ibrahim v. Ambika Pershad*, 39 Cal. 527 (P.C.).

A puisne mortgagee paying off a prior mortgagee does not get any *new charge* in respect of that payment. The language of sec. 74 makes it clear that the second mortgagee is, by redemption of the prior mortgage, to acquire no other right than that possessed by the first mortgagee. In effect, there is deemed to be a transfer of the first mortgage to the second mortgagee. The law secures to the latter which he might have acquired by a conveyance. But there is no question in this case of creating a new charge on the property—*Perianna v. Marudainayagam*, 22 Mad. 332 (335).

A puisne mortgagee paying off a mortgage-debt is entitled to proceed against all the mortgagors jointly, *i.e.*, against the whole property, and not against each of the mortgagors for the proportionate share of the debt due by each of them. In this respect his position is different from that of a redeeming co-mortgagor who is entitled only to proceed against the co-mortgagors for the proportionate share of the debt due by each—*Tabarak Ali v. Dalip Narain*, 8 P.L.T. 255, A.I.R. 1927 Pat. 117 (121), 98 I.C. 968.

The rights which the puisne mortgagee acquires upon redemption of the prior mortgage are the rights of the prior mortgagee *as mortgagee*, and any rights of the prior mortgagee *as landlord* do not pass to the puisne

mortgagee; therefore all subsidiary rights created on the mortgaged property by the mortgagee, such as lease-rights, will come to an end *ipso facto* when the mortgage is redeemed; and a tenant continuing on the land must be treated as a trespasser thereafter, unless from the conduct of parties or otherwise a fresh tenancy arises—*Alagirisami v. Akkulu Naidu*, 41 M.L.J. 462, 69 I.C. 651, A.I.R. 1925 Mad. 1282.

The remedy provided in this section is not the only remedy open to a subsequent mortgagee paying off a prior mortgage; he can also bring a suit under sec. 69, Contract Act—*Durga Charan v. Ambica Charan*, 54 Cal. 424, A.I.R. 1927 Cal. 393 (394), 45 C.L.J. 191.

The subsequent mortgagee paying off a prior mortgage is in most cases presumed to have intended to keep alive the prior mortgage. See Note 537 under sec. 101.

Payment of prior mortgage-decree:—The puisne mortgagee can redeem the prior mortgage even after a preliminary *decree* has been passed in a suit by the prior mortgagee against the mortgagor; and by so doing the puisne mortgagee can under this section acquire all the rights of the prior mortgagee—*Gopi Narayan v. Bansidhar*, 27 All. 325 (332) (P.C.). See also *Premasukhdas v. Peerkhan*, 23 N.L.R. 86, A.I.R. 1926 Nag. 21 (24), 95 I.C. 979, and *Kotappa v. Raghavayya*, 50 Mad. 626, 52 M.L.J. 532, 102 I.C. 316, A.I.R. 1927 Mad. 631 (635). But this would not have the effect of reviving or giving vitality to a decree which by the terms of it has become discharged (by the payment made by the puisne mortgagee). In other words, the second mortgagee who discharges the prior mortgage and the decree obtained on that mortgage is not an assignee of the mortgage or of the decree, and is not entitled to work out his rights by executing the decree (under the provisions of sec. 47, C. P. Code) but has to bring a *fresh suit* for the purpose of obtaining a *new decree*—*Gopi Narain v. Bansidhar*, 27 All. 325 (332, 333) (P.C.), (reversing *Bansidhar v. Gaya Prasad*, 24 All. 179); *Shib Lal v. Munni Lal*, 44 All. 67 (70); *Kottappa v. Raghavayya*, *supra*. A distinction should be made between a *prior mortgage* as such and a *prior mortgage-decree*; if a prior mortgage is no longer alive as a *mortgage* but has suffered a change into a *decree* for sale, and cannot therefore be enforced as a mortgage by the prior mortgagee, it cannot be deemed alive as a mortgage and enforceable as such by the puisne mortgagee who has paid it off in the shape of a *decree-debt*. In such a case the puisne mortgagee is subrogated not to its original form as a *mortgage-charge* but to the *decree-charge* held by the prior mortgagee, *i.e.*, the right to hold the property to sale to satisfy the decree debt. The payment of the decree by the puisne mortgagee cannot reverse the process of conversion it has passed and revive it again as a mortgage. But the puisne mortgagee can enforce his remedy only by bringing a *fresh suit*, and not by executing the decree from the point at which the prior mortgagee left off. That decree has been already satisfied, and no one can execute a satisfied decree—*Parvati Ammal v. Venkatarama*, 47 M.L.J. 316, A.I.R. 1925 Mad. 80 (82, 84), 81 I.C. 771. Where a puisne mortgagee has, in execution of a decree on his mortgage, purchased the mortgaged properties and subsequently, pending an application by the mortgagor to set aside the sale, pays off a prior mortgagee-decreeholder, he is entitled, if the sale is set aside, to enforce the prior mortgage against the properties secured by it—*Sibanand v. Jagmohan*, 1 Pat. 780 (784), 3 P.L.T. 533, A.I.R. 1922 Pat. 499, 68 I.C. 707.

516A. Surety:—A surety of the mortgagor is one of the persons mentioned in section 91 as having a right to redeem the mortgaged property, and consequently he acquires the right of subrogation.

"A surety is obviously entitled to be subrogated to the rights of the creditor if he pays him off. To use the argument of Sir S. Romilly in *Craythorn v. Swinburn* (14 Ves. 160, at p. 162) 'a surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having the right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor.' The same principle has been incorporated in sections 140 and 141 of the Indian Contract Act, 1872."—*Report of the Special Committee.*

517. Co-mortgagor:—"The right of a co-mortgagor or one of several joint debtors to be subrogated to the security of the creditor, so as to enable him to recover from his co-debtors by means of such securities their proportionate shares of indebtedness which has been discharged by him, rests upon the same equity as that of a surety or any other person entitled to redeem the mortgage; for each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay and as the surety for his co-debtors as to the part which ought to be discharged by them (*see* Ghose on Mortgage, Vol. I, p. 371, 5th Edn.)."—*Report of the Special Committee.*

Rights of redeeming co-mortgagor:—The rights of a redeeming co-mortgagor were separately provided for in the old section 95. They have now been included in the present section, which is a comprehensive section on subrogation. In section 95 it was said that the redeeming co-mortgagor had a *charge* on the shares of the other co-mortgagors, under section 100, but he could not claim all the rights of the original mortgagee. Such a charge carried with it the right to bring the property to sale, but the redeeming co-mortgagor had not the right to stand upon the original security nor had a priority, in respect of his charge, on the principle of subrogation—*Umar Ali v. Asmat Ali*, 58 Cal. 1167 (F.B.), 35 C.W.N. 409 (421, 422). Under the present section, the redeeming co-mortgagor has been placed on the same footing as the mortgagee whom he has paid off, and the right of subrogation has been expressly conferred on him. This view was also taken long ago in an Allahabad case—*Harprasad v. Raghunandan*, 31 All. 166 (169).

The fact that one co-mortgagor redeems the entire estate and is in possession of it, does not entitle him to hold it *adversely* to the other co-mortgagors, even though he had been in exclusive possession of the entire estate prior to redemption. Like a mortgagee, he is only entitled to a charge on the property—*Chandbhai v. Hasanbhai*, 46 Bom. 213 (215), A.I.R. 1922 Bom. 150, 64 I.C. 205. But if the mortgage is a *usufructuary* one, and the amount is satisfied out of the usufruct, one co-mortgagor cannot take possession of the entire property from the mortgagee, but is entitled to recover only his individual share. If, however, he gets possession of the entire property, he is then deemed to hold the share of the others *adversely* to them, and not subject to a *charge* (for since he had to pay nothing, he cannot have any charge)—*Gobardhan v. Sagar*, 16 All.

254. If a purely usufructuary mortgage is redeemed by one co-mortgagor by paying the money out of his own pocket, instead of being redeemed out of the usufruct, the redeeming co-mortgagor has no doubt a charge on the property, but he cannot in enforcing the charge sell the shares of the co-mortgagors, since there is no personal covenant in the original mortgage. His only right is to retain possession until payment to him—*Mamola v. Kedar*, 22 I.C. 918 (Oudh). The original mortgagee under the usufructuary mortgage had no right of sale (sec. 67) and there is no reason why the redeeming co-mortgagor should be placed in a better position than the mortgagee, and be allowed to bring the property to sale.

Under the old section 95 which gave the redeeming co-mortgagor only a *charge* on the shares of the other co-mortgagors, it was held that he was not entitled to recover the money by a *sale of those shares* but could only hold the entire property in charge until he was in his turn redeemed by his co-sharers on payment of their shares of the debt. He was not in the position of a mortgagee, for as soon as he redeemed the whole mortgage, the mortgage came to an end—*Ali Akbar v. Sultan-ul-mulk*, 69 I.C. 653, A.I.R. 1923 Lah. 129 (130). A similar view was taken in *Aziz Ahmad v. Chhote Lal*, 50 All. 569, 109 I.C. 38, A.I.R. 1928 All. 241 (245). His remedy was only by way of contribution and not a suit for enforcement of the mortgage—*Ramachandra v. Narayanaswami*, 51 Mad. 810, 55 M.L.J. 326, 112 I.C. 6, A.I.R. 1928 Mad. 950 (951). These decisions are no longer correct, because the redeeming co-mortgagor is now given the same rights as the mortgagee. A Calcutta Full Bench also expressed the opinion that the redeeming co-mortgagor had, on the strength of his charge, a right to bring the property to sale, whether the original mortgagee had such right or not (*e.g.*, even though the original mortgagee was a mortgagee by conditional sale or a usufructuary mortgage, who had no right to bring the property to sale)—*Umar Ali v. Asmatali*, 58 Cal. 1167 (F.B.), 35 C.W.N. 409 (423).

A co-mortgagor who redeems the entire mortgage and stands in the position of a mortgagee breaks the integrity of the mortgage thereby, because he may be deemed a *mortgagee who has acquired the share of a mortgagor* (*i.e.*, his own share), within the meaning of sec. 60. Consequently he cannot compel the other co-mortgagors to redeem the whole property in solidum, but he must split up his claim into a claim against each, and can only insist upon each of them to redeem only his own share of the mortgaged property. See *Umar Ali v. Asmatali*, 58 Cal. 1167 (F.B.), 35 C.W.N. 409 (422). This is also evident from the words "proportion" and "his share" occurring in section 95. See also *Ghulam Maula v. Banno*, 4 O.C. 273. In this respect the position of a redeeming co-mortgagor stands different from that of a puisne mortgagee paying off a mortgage-debt. The latter is entitled to proceed against all the mortgagors jointly, and not against each of the mortgagors for the proportionate share of debt due by each of them—*Tabarak Ali v. Dalip Narain*, 8 P.L.T. 255, 98 I.C. 968, A.I.R. 1927 Pat. 117 (121); on appeal, 9 P.L.T. 313, A.I.R. 1927 Pat. 379 (381), 103 I.C. 703.

517A. Other persons:—This section lays down that all persons who are referred to in sec. 91 can, upon redeeming the mortgaged property, claim the right of subrogation. And so, a *person having an interest in the mortgaged property* can, upon redemption, claim the right. Thus, where a member of a Malabar tarward paid off a mortgage of the tarwad

property created by a previous Karnavan, *held* that as he was not a mere volunteer nor even a stranger, but was a member of the tarwad, and, as such having an interest in the property and a right to protect it, he was entitled to be subrogated to the rights of the mortgagee—*Nangunni Kovillamma v. Nedungadi*, 31 L.W. 165, A.I.R. 1929 Mad. 860 (862).

A purchaser of a portion of the equity of redemption is a person entitled to redeem within the description of sec. 91, and such person on redeeming the property subject to the mortgage is entitled to a right of subrogation under sec. 92—*Jhum Lal v. Sham Narayan*, 13 P.L.T. 686, A.I.R. 1933 Pat. 33 (34), 140 I.C. 845; see also *Udit Narain v. Ashrafi*, 38 All. 502 (504).

518. 3rd para—Payment by third person:—

“It cannot, however, be laid down as a general rule that a person merely discharging a debt is entitled to the benefit of the mortgage. Obviously, a mortgagor himself who is liable to pay a debt contracted by him, or the transferee from such a mortgagor who has undertaken the liability, cannot claim the right of subrogation; nor can the application of the principle be invoked in favour of a mere volunteer (I.L.R. 32 All. 25). As stated in *Ghose on Mortgage*, Vol. I, p. 364, 5th Edn., the real question in all such cases is whether the payment made by a person who is not in any way interested in the mortgaged property or the right of redemption was a mere loan to the debtor on his personal security, or whether it was made under an agreement that he should be substituted for the creditor. Although in most cases a Court may presume such an agreement, we think it desirable to provide that such an agreement must be reduced to writing and must be registered.”—*Report of the Special Committee*.

This para lays down the rule of what is called *conventional* subrogation, which takes place when a third party, who has no interest to protect, advances money under the agreement that he would be subrogated to the rights and remedies of the creditor. See *Gurdeo Singh v. Chandrika*, 36 Cal. 193 (218). “Under the equitable doctrine of subrogation, one who pays a mortgage-debt under an agreement for an assignment or for a new mortgage for his own protection or for the benefit of another, acquires a right to the security held by the other”—*Jones on Mortgage*, sec. 874. Under the old law, the agreement could be presumed (41 All. 372; 33 Cal. 1133); under the present law, it must be express and *in writing registered*. “Express agreement only entitles third persons to subrogation, and not mere understanding is enough”—*Jones on Mortgage*, Vol. 2, § 874; *Narayana v. Pechiammal*, 36 Mad. 426 (433).

The mere fact that money is borrowed and is used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. The right to the benefit depends upon the existence of an *agreement* between the borrower and lender in which it is provided that the subsequent lender must be substituted for the earlier creditor—*Gulzari Lal v. Aziz Fatima*, 41 All. 372, 50 I.C. 375; *Ram Hail v. Pohkar*, 7 Luck. 237, 134 I.C. 1093, A.I.R. 1932 Oudh 54.

The doctrine of subrogation is not applied to a mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own—*Gurdeo v. Chandrika*, 36 Cal. 193 (219);

Chama Swami v. Padalu, 31 Mad. 439 (442); *Narayana v. Pechiammal*, 36 Mad. 426 (434); *Govinda v. Lokanatha*, 40 M.L.J. 114, 62 I.C. 291 (295); *Brijmohan v. Dukhan*, 9 Pat. 816, A.I.R. 1931 Pat. 33 (37), 130 I.C. 168. The principle is that the person claiming subrogation had to pay the debt under grave necessity to save himself a loss. No such necessity arises in the case of a mere stranger—*Narain v. Narain*, 52 All. 1037, A.I.R. 1931 All. 40 (42). In a Calcutta case it was broadly stated that a stranger (notwithstanding the provisions of sec. 74, Contract Act) was entitled to be subrogated to the rights of the mortgagee to the extent of the money paid by him, if he paid off the mortgage-debt, even if he was not asked to do so by the mortgagor—*Gobinda Chandra v. Parsa Nath*, A.I.R. 1926 Cal. 231, 89 I.C. 116, following the English case of *Butler v. Rice*, (1910) 2 Ch. 277. But this view is not correct and has been disapproved of in *Adari Sanyasi v. Nookalamma*, 54 Mad. 708, A.I.R. 1931 Mad. 592 (596) and *Vellayudhan v. Nallathambi*, A.I.R. 1928 Mad. 541 (542). "Subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which in the event of default by the debtor he would be bound to pay or where he had some interest to protect, or where he advanced the money under an agreement, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor"—*Narayana Kutti v. Pechiammal*, 36 Mad. 426 (432), citing *Wilkins v. Gibson*, 113 Georgia 31. A mere volunteer is not entitled to the benefit of any payment that he might make on behalf of a debtor, whether it be to redeem a mortgage or to pay off a simple money-debt—*Vellayudhan v. Nallathambi*, supra. The Bombay High Court was of opinion that if a person, who was a stranger to the mortgage and had no right to any part of the equity of redemption, made payment to the mortgagee of the mortgage-money, such payment *prima facie* amounted to a transfer to him of the mortgagee-rights, and he was entitled to be subrogated to the rights of the mortgagee—*Shankar v. Bhikaji*, 53 Bom. 353, 31 Bom.L.R. 129, A.I.R. 1929 Bom. 139 (140), 116 I.C. 225; *Tangya v. Trimbak*, 40 Bom. 646, 18 Bom.L.R. 700, 35 I.C. 794. These two decisions are no longer law.

A purchaser of the mortgaged property who has paid off mortgages on the property, is entitled, after the sale is found to be invalid, to stand in the shoes of the mortgagee whom he has paid off. He is not a mere volunteer, because when he discharged the mortgages he did so by virtue of his claim as a purchaser and had an interest to protect—*Nasiruddin v. Ahmad Husain*, 25 A.L.J. 20 (P.C.), A.I.R. 1926 P.C. 109 (110), 31 C.W.N. 538, 97 I.C. 543; *Chama Swami v. Padala Anandu*, 31 Mad. 439 (442), 18 M.L.J. 306; *Syamalarayudu v. Subbarayudu*, 21 Mad. 143; *Anmani Ammal v. Ramaswami*, 37 M.L.J. 113, 51 I.C. 57 (60). But when at the time he discharged the mortgage he was not in the position of a purchaser but was merely contracting to purchase the mortgaged property, and consequently had no interest to protect, and then the contract fell through owing to his own default, he was not entitled to be subrogated to the rights of the mortgagee—*Ponnammal v. Pichai*, 52 M.L.J. 33, A.I.R. 1927 Mad. 204 (206), 99 I.C. 687. So also, a purchaser cannot claim the right of subrogation, when there was no discharge of any prior mortgage to which his payment of the purchase-money could be ascribed, the prior mortgage having been already satisfied by execution sale of the property—*Audinatha v. Bharathi*, 30 L.W. 981, A.I.R. 1929 Mad. 890 (892). A purchaser whose purchase is found to be invalid is a mere volunteer, and

is not entitled to subrogation—*Pichaiyappa v. Govindaraju*, 33 L.W. 78, A.I.R. 1931 Mad. 110 (111), 130 I.C. 506.

518A. Mortgagor's agent:—As the mortgagor himself paying off a prior debt is not entitled to subrogation (see Note 515), it is also clear that under normal conditions where the mortgagor employs an agent to clear a prior mortgage, the agent is not entitled to subrogation for the manifest reason that the agent cannot be clothed with a higher right than his principal—*Narain v. Narain*, 52 All. 1037, 1930 A.L.J. 1577, A.I.R. 1931 All. 40 (42). Thus, where the mortgagor sold the equity of redemption and left with the vendee a sum to be paid to a prior mortgagee, the vendee paying off the prior mortgage must be deemed to have done so as the agent of the mortgagor, and was not entitled to subrogation—*Baijnath v. Murlidhar*, 4 A.L.J. 349; *Tulsi v. Radha Kishen*, A.I.R. 1933 Lah. 810.

So also a subsequent mortgagee discharging the prior mortgage at the mortgagor's request, or out of the money left with him by the mortgagor for the purpose, does not do so as mortgagee but as agent of the mortgagor, and in such a case he cannot claim to be subrogated to the rights of the mortgagee so paid off—*Tufail v. Bilota*, 27 All. 400; *Shafiquallah v. Samiullah*, 52 All. 139, A.I.R. 1929 All. 943 (946).

It is in each case a question of fact whether a payment has been made by a person as a mere agent of the mortgagor or on his own account for the protection of his interest in the mortgaged property—*Narain v. Narain*, supra. Where the second mortgage was executed with the express purpose of discharging the prior mortgage, and money was left with the second mortgagee for that purpose, and the parties, contemplating the possibility of the money left with the mortgagee proving insufficient for the purpose, covenanted that if such a contingency arose, the mortgagors would be personally liable for it, the intention of the parties was that the prior mortgage should be extinguished. There is no question of subrogation, and the mortgagee by paying the excess amount is not entitled to claim the amount as a prior charge—*Said Ahmad v. Raja Barkhandi*, 8 Luck. 40, A.I.R. 1932 Oudh 255, 139 I.C. 64.

This doctrine of agency has, however, been repudiated by the Allahabad Full Bench in *Tota Ram v. Ram Lal*, 54 All. 897, A.I.R. 1932 All. 489 (491), which makes no distinction between a case where the subsequent mortgagee pays off the prior mortgage of his own accord or pays it off out of the money left in his hands by the mortgagor.

519. 4th para—Payment must be in full:—"In order to avoid any complication and the difficulty of apportioning the claims arising from subrogation, the Courts have held that a right of subrogation does not arise till the whole of the mortgage debt is paid off (I.L.R. 36 Cal. 193; 38 All. 502). We, therefore, propose to provide in the last paragraph of section 92 that the right of subrogation shall not be claimed unless the mortgage in respect of which the right is claimed has been redeemed in full."—*Report of the Special Committee*.

The tender must be of the full amount due on the prior mortgage. Before one creditor can be subrogated to the rights of another, the demands of the latter must be *entirely* satisfied so that he shall be relieved from all further trouble, risk and expense. Subrogation is by redemption, and there can be no subrogation where there has been no redemption. A *partial* payment of the debt on an earlier mortgage by

a subsequent mortgagee does not give a claim for subrogation—*Gurdeo v. Chandrika*, 36 Cal. 193 (220, 221); *Hanumanthaiyan v. Meenatchi*, 35 Mad. 183; *Venkata Lakshminarayana v. Venkayya*, 43 M.L.J. 284, 95 I.C. 689, A.I.R. 1922 Mad. 441 (442); *Narain Pershad v. Narain Singh*, 52 All. 1037, A.I.R. 1931 All. 40 (42); *Lekhraj v. Jang Bahadur*, 7 P.L.T. 22, 89 I.C. 822, A.I.R. 1926 Pat. 23; *Ma Lon v. Ma Nyo*, 1 Rang. 714, A.I.R. 1924 Rang. 204, 79 I.C. 766. Such partial payment would only have the effect of giving fresh life to the prior mortgage—*Brijmohan v. Dukhan*, 9 Pat. 816, A.I.R. 1931 Pat 33 (37), 130 I.C. 168, 11 P.L.T. 883. The person who makes the payment cannot, by simply paying the interest as it accrues due or paying or discharging a portion of the interest which has already accrued, claim a right of subrogation. He must pay the entire amount of the incumbrance which is senior to his own—*Gurdeo Singh v. Chandrika Singh*, 36 Cal. 193 (220). A purchaser of the equity of redemption cannot, upon redeeming only a half share of the mortgage, claim a right to subrogation—*Kanhaiya v. Ikram Fatima*, 8 Luck. 103, A.I.R. 1932 Oudh 268 (271). A subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the prior mortgagee may have purchased the mortgaged property at an auction sale held in execution of the decree obtained by him on his mortgage; where he (the subsequent mortgagee) elects to redeem the prior mortgage under such circumstances, he, like the mortgagor, will not be entitled to do so save upon tender or payment of the full amount due on it—*Dip Narain v. Har Singh*, 19 All. 527; *Gurdeo Singh v. Chandrika Singh*, 36 Cal. 193; *Wahidunnissa v. Gobordhan*, 25 All. 388 (394) (F.B.); *Dino Nath v. Lachmi Narayan*, 25 All. 446 (453); *Danoba v. Damodar*, 16 Bom. 486; *Phulmani v. Nageshar*, 33 All. 370. But the subsequent mortgagee is entitled to subrogation if the prior mortgage has been entirely satisfied, although he has advanced only a part of the money—*Rupabai v. Audimulam*, 11 Mad. 345; *Saminatha v. Krishna*, 38 Mad. 548; *Ram Sarup v. Ram Richhpal*, 51 All. 920, A.I.R. 1929 All. 621, 119 I.C. 84.

If, however, a purchaser of the equity of redemption, with the consent of the prior incumbrancer, partially discharges the mortgage-debt, and the prior incumbrancer accepts the part payment and allows the liability on the property to be discharged in part, the purchaser is entitled to stand in the shoes of the prior incumbrancer, and is entitled to claim priority over subsequent incumbrancers—*Udit Narain v. Ashrafi*, 38 All. 502 (504); *Prem-sukhdas v. Peer Khan*, 23 N.L.R. 86, A.I.R. 1926 Nag. 21 (24), 95 I.C. 979.

A puisne mortgagee intending to redeem a prior mortgage must pay for the advances made and expenses incurred by the prior mortgagee and which the prior mortgagee is entitled to add to his mortgage money under sec. 72—*Fulsa v. Khubchand*, 1891 A.W.N. 193.

80. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And except in the case provided

93. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided

for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

"As the principle of 'tacking' is closely allied to subrogation, we propose to put section 80 as section 93."—*Report of the Special Committee.*

Excepting a verbal alteration in the marginal note, no other amendment has been made.

520. Principle:—This section was enacted with the object of prohibiting the English form of tacking which gave an unjust priority to the holder of a third mortgage over the holder of a second mortgage when the third mortgagee had paid off the first mortgage—*Tajjo Bibi v. Bhagwan Prosad*, 16 All. 295. The English doctrine of tacking is of so special and technical a character, and so little founded on general principles of justice that it ought not to be held applicable to this country, but that the obligations arising out of the successive mortgages should be discharged in the order of their date—*Narayan v. Pandurang*, 7 Bom. 526. And this section therefore expressly declares that by the mere payment of a prior mortgage, a subsequent mortgagee does not acquire for his subsequent mortgage any priority over any other mortgage—*Girdhar v. Ram Autar*, 8 C.W.N. 690. Thus, the owner of a house mortgaged it in 1861 to A and put him in possession and in 1873 mortgaged the same to B and in 1874 again to A to secure another sum. B, who sued the mortgagor for possession and obtained a decree and was resisted by A in execution, sued A to eject him and to obtain possession of the mortgaged property until he was paid off the amount due on his mortgage, whereupon A set up his own two mortgages, and claimed to be paid the amount due on *both* of them before he could be called upon to render up possession. *Held*, that A's right as against B was either to redeem B's intermediate mortgage, or else to hold the mortgaged property until his own first mortgage was redeemed by B, but that A could not claim to retain possession as against B until his *third* mortgage as well as his first was paid off, since B's mortgage was prior in date to, and therefore was to be preferred before, the third mortgage of A—*Narayan v. Pandurang*, 7 Bom. 526. A property was mortgaged to A, and then to B, and then again to A. A obtained two decrees on his mortgages (*i.e.*, first and third mortgages) and the whole of the sale-proceeds realised in execution of his decrees was paid to him. B then obtained a decree on his mortgage and sued A in which he claimed that his decree should be satisfied out of the sale proceeds before satisfying A's decree under the third mortgage. A contended that as the property had been sold in discharge of *both* his incumbrances, he was entitled under sec. 73, C. P. Code (1908) to the proceeds in respect of both of his decrees in priority to the second mortgagee. *Held* that A's contention could not prevail, for such a distribution of sale-proceeds, postponing the second mortgagee to the third, would be to defeat the intention of the legislature

as expressed in section 73 of the C. P. Code and also in section 80 (93) of the Transfer of Property Act—*Mithu Lal v. Kishan Lal*, 12 All. 546.

The words “except in the case provided for by section 79” mean except where the mortgage expresses a maximum to be secured thereby. If no maximum is fixed, the case falls under the latter part of this section and the prior mortgagee, making a subsequent advance to the mortgagor whether with or without notice of an intermediate mortgage, does not acquire any priority over the intermediate mortgage in respect of his security for such subsequent advance—*Imperial Bank of India v. U. Rai Gyarw Thu & Co., Ltd.*, 51 Cal. 86 (98) (P.C.), 1 Rang. 637, A.I.R. 1923 P.C. 211, 28 C.W.N. 470, 76 I.C. 910.

75. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure, and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

Rights of mesne mortgagee against prior and subsequent mortgagees.

94. *Where a property is mortgaged for successive debts to successive mortgagees. a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.*

Rights of mesne mortgagees.

Amendment:—This section has been redrafted by sec. 47 of the T. P. Amendment Act (XX of 1929).

“Section 75 and Order XXXIV, rule 11, of the Code of Civil Procedure embody partly the principle of subrogation and partly the principle expressed in the phrase ‘redeem up and foreclose down.’ We have transferred to section 92 so much of sec. 75 and of Order XXXIV, rule 11, as relates to the doctrine of subrogation and embodied in a new section so much of the section and rule as relates to the conception of ‘foreclosing down.’ As this is a rule more of substantive law than of procedure, its proper place is in the Transfer of Property Act and not in the Code of Civil Procedure. We, therefore, propose to omit section 75 and to repeal Order XXXIV, rule 11. As this doctrine is akin to the doctrine of subrogation, we have placed it after section 92.”—*Report of the Special Committee.*

521. This section only relates to the rights of the second mortgagee as against the subsequent mortgagees, and does not define his rights as against the mortgagor, which have to be gathered from the other provisions of the Act—*Kanti Ram v. Kutubuddin*, 22 Cal. 33 (38, 42).

The principle of law is ‘redeem up, foreclose down’; so, if there are several mortgagees, the later can always redeem the earlier, but the earlier cannot redeem the later except by consent—*Chinna Pillai v. Venkatasamy*,

40 Mad. 77; *Premasukhdas v. Peerkhan*, 23 N.L.R. 86, A.I.R. 1926 Nag. 21 (23), 95 I.C. 979.

95. Where one of several mortgagors redeems the mortgaged property, and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

95. Where one of several mortgagors redeems the mortgaged property, * * * *he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.*

Amendment:—This section has been amended by sec. 48 of the T. P. Amendment Act (XX of 1929) for the following reasons:—

“As in the proposed section 92 a co-mortgagor is allowed the right of subrogation, we are of opinion that instead of providing for a separate charge for the costs of redemption it will be better if it is provided that a co-mortgagor can add such costs to the mortgage-money and recover them from other co-mortgagors in proportion to their shares in the property. We have amended the section accordingly.”—*Report of the Special Committee.*

The words “obtains possession” have been omitted. See Note 524 below.

This section is supplementary to sec. 92 in respect of co-mortgagors.

522. Principle:—The principle of this section is the principle upon which contribution is claimed by and is allowed to one co-sharer of a property against another, when the former discharges a joint debt; and it is this: that parties who are equally bound to pay a common debt and who are relieved of the burden of that debt by one of them should re-imburse him all that he has paid in excess of his proper share of the debt; and when one of two co-mortgagors pays off the entire mortgage-debt, he is entitled to be in the position of the mortgagee, for the purpose of obtaining contribution from his co-mortgagor—*Raushan Ali Khan v. Kali Mohan*, 4 C.L.J. 79. Under the old section 95 which was the only section containing a complete statement of the right of a redeeming co-mortgagor, such a mortgagor had merely a “charge on the shares of the other co-mortgagors for his proportion of the expenses” etc., but this was not a right of subrogation; and the old section 74, which was the only section dealing with subrogation, did not include the case of a redeeming co-mortgagor but was concerned only with the subsequent mortgagee redeeming a prior mortgage. In effect, the old Act did not give the redeeming co-mortgagor anything in the nature of a right of subrogation. The amended sections 92 and 95 now make it clear that the right of the co-mortgagor redeeming is the same right as the mortgagee whose mortgage

he redeems may have against the mortgagor, and this right has been expressly stated to be a right of subrogation—*Umar Ali v. Asmatali*, 58 Cal. 1167 (F.B.), 35 C.W.N. 409 (419), 130 I.C. 889. The old section 95 has been elaborately analysed and explained in this case.

Each and every one of the mortgagors who owns separate shares in the mortgaged property is entitled to redeem the whole estate by payment of the whole mortgage-debt, and seek contribution from the others—*Norender v. Dwarka*, 5 I.A. 18 (27), 3 Cal. 397 (P.C.).

The word 'mortgagor' includes persons deriving title from the mortgagor (sec. 59A); consequently, a purchaser of the equity of redemption of one of the mortgagors can redeem the whole mortgage—*Dhakeswar v. Harihar*, 21 C.L.J. 104, 27 I.C. 780 (783); *Ramchandra v. Narayanaswami*, 51 Mad. 810, 112 I.C. 6, A.I.R. 1928 Mad. 950 (951); *Mohan v. Kashinath*, 3 N.L.R. 92. So also, one of the representatives of the original mortgagor can do so—*Mamola v. Kedar Nath*, 22 I.C. 918 (919) (Oudh).

523. Redeems:—*Co-mortgagor paying money after mortgage-decree:*—A charge is created under this section in favour of a co-mortgagor who *redeems*, and there can be redemption only as long as the mortgage subsists. Where an order absolute for sale has been passed under sec. 89 of the T. P. Act, the security as well as the mortgagor's right to redeem are both extinguished, and any payment made thereafter cannot be taken as payment by way of 'redemption'; consequently no charge can be created under this section in favour of the person who makes such payment—*Rabnath v. Ganesh Prosad*, 23 O.C. 334, 60 I.C. 213; *Nawab Jahanara v. Mirza Shujaud din*, 9 C.W.N. 865 (867). But a different view has been taken by the Bombay High Court. Thus, it has been held there that even if *after* a decree has been passed for sale, one of the co-mortgagors sells his share of the property and the purchaser pays off the entire mortgage debt and saves the property from sale, he acquires a charge on the property in respect of so much of the money as the portions of the other co-mortgagors were rateably liable for—*Danappa v. Yamnappa*, 26 Bom. 379. This is also the view of the Allahabad High Court. See *Ibn Husain v. Ramdai*, 12 All. 110, where the mortgage was satisfied by a co-owner of the property *after decree*.

Under the present Rule 5 of Order 34, the mortgagor can redeem *even after sale*, and before the confirmation of the sale.

Payment need not be made in Court:—All that this section requires is that one of several co-mortgagors should redeem the mortgaged property in order to obtain a charge on the shares of the other co-mortgagors. It is not essential that the redemption should take place *in Court*. If the money is paid out of Court, and the decree-holder accepts it, and certifies the payment, the requirements of this section are fulfilled—*Tukarama v. Arjuna*, 45 I.C. 904 (Nag.).

Redemption by payment of balance due:—A person is said to 'redeem' a mortgage, if he pays off the balance of money remaining due on the mortgage and releases the security. The word 'redeem' means to 'buy back' or 'set free by payment.' The property was 'bound' by the mortgage; any action taken to 'cut the bond' by payment of money is a redemption. Where there have been payments in part satisfaction of a decree, the payment of the balance due upon the mortgage is as much a redemption as the payment of the whole sum due in a case when there has been no previous part-payment. Therefore, a co-mortgagor is entitled

to a charge under this section who pays off the balance of money due upon the mortgage and releases the property—*Hira Kuer v. Palku*, 3 P.L.J. 490, 46 I.C. 479.

524. Possession not necessary:—The old section contained the words “obtains possession” which gave rise to some misunderstanding, for which the Legislature has thought fit to omit them from the present section. The *Special Committee* observes:—

“Section 95 gives a co-mortgagor redeeming the mortgage a charge on the shares of the other co-mortgagors in the mortgaged property for expenses incurred by him in redeeming the mortgaged property and obtaining possession thereof. The section has been based on the observations in Macpherson’s Law of Mortgage, 5th Edn., p. 145. It is difficult to understand why the words ‘obtains possession thereof’ are inserted in this section. In I.L.R. 11 Mad. 416 the Madras High Court observed that the section gave the redeeming co-mortgagor two rights, (1) a right to obtain possession and (2) a charge on the interests of his co-mortgagors. In I.L.R. 26 All. 227 the Allahabad High Court held that the words were only applicable if the mortgagee is in possession. In *Malik Ahmad Wali Khan v. Musammat Shamsi Jahan Begam*, L.R. 33 I.A. 81, 28 All. 482, their Lordships of the Privy Council observed as follows:—

“The section might be so strictly construed as to limit its operation to mortgages under which possession passes, and, therefore on redemption properly re-passes. But it seems to their Lordships more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible and in other cases to make the charge follow upon redemption.”

“In view of the above observation, the reference to the recovery of possession in the section seems undesirable and we propose that it should be omitted.”

In other words, if the mortgagee was not in possession, the redeeming co-mortgagor need not obtain possession. See *Bhagwan Das v. Hardei*, 26 All. 227; *Ibn Hasan v. Brijbhuknan*, 26 All. 407 (417); *Hira Kuer v. Palku*, 3 P.L.J. 490, 46 I.C. 479; *Ghulam Maula v. Banno*, 4 O.C. 273; *Qamar Jahan v. Munney Mirza*, 12 O.L.J. 313, 2 O.W.N. 413, 92 I.C. 559, A.I.R. 1925 Oudh 613; *Mohun v. Kashinath*, 3 N.L.R. 92; *Jag Mohan v. Naurang*, 20 O.C. 72, 39 I.C. 186 (187). The section must be construed on the footing that in cases in which there is no question of obtaining possession, the charge is intended to follow immediately upon the redemption—*Umar Ali v. Asmatoli*, 58 Cal. 1167 (F.B.), 35 C.W.N. 409 (419).

Redeeming mortgagor’s right of subrogation:—See Note 517 under sec. 92.

525. Interest:—Under this section the redeeming co-mortgagor is given a charge only for the *expenses* properly incurred by him in redeeming the property, but it does not provide for *interest* on the redemption-money. It lies on the discretion of the Court to allow a reasonable interest—*Gafur Imam v. Amir Isab*, 49 Bom. 591, A.I.R. 1925 Bom. 484 (485), 88 I.C. 658. In the Privy Council case of *Ahmad Wali Khan v. Shamsul*, 28 All. 482 (P.C.), their Lordships did not allow interest from the date of redemption, but only from the date of institution of the suit

by the redeeming co-mortgagor to recover from the other co-mortgagors their share of the redemption-money, and the interest was allowed at the Court-rate (6 per cent). No interest was allowed for the intervening period. This case has been followed by the Bombay High Court in *Gafur Imam v. Amir Isab*, supra.

The Calcutta High Court holds that the doctrine of subrogation by which the redeeming co-mortgagor is put in all respects in the position of the mortgagee is only a fiction of law, and the extent to which it would be carried in any particular case must be governed by equitable considerations, so as to attain the ends of substantial justice—*Digambar v. Harendra*, 14 C.W.N. 617 (623), 11 C.L.J. 226, 5 I.C. 165. In this case (p. 624), interest at the rate stipulated in the mortgage was allowed from the date of redemption up to the date when it was decreed that the redeeming mortgagor had a charge on the shares of the other co-mortgagors; and from that date up to the date of realisation, at the Court rate. The Oudh Court holds that the rate of interest must be reasonable. The fact that the redeeming co-mortgagor had to borrow redemption money at a high rate of interest is not a ground for charging the same rate from the other co-mortgagors—*Jago v. Arjun*, 49 I.C. 230 (Oudh). See also *Raushan Ali v. Kali Mohan*, 4 C.L.J. 79, where the Court allowed interest at 12 per cent.

Mortgage by deposit of title-deeds.

96. *The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.*

Mortgage by deposit of title-deeds.

This section has been inserted by sec. 48 of the T. P. Amendment Act (XX of 1929). "As the present law is not clear regarding the rights and liabilities of parties to a mortgage by the deposit of title-deeds, we have inserted a new section (sec. 96) applying to such mortgages the provisions applicable to simple mortgages."—*Report of the Select Committee* (1929).

97. *[Repealed by Act V of 1908.]*

See O. XXXIV, r. 13 in the Appendix.

Anomalous Mortgages.

98. In the case of a mortgage, not being a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, or an English mortgage, or a combination of the first and third, or the second and third, of such forms,

Mortgage not described in section 58 clauses (b) (c), (d) and (e).

98. In the case of an anomalous mortgage, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed and so far as such contract does not extend, by local usage.

Rights and liabilities of parties to anomalous mortgage.

the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Amendment:—This section has been amended by sec. 49 of the T. P. Amendment Act (XX of 1929).

“As stated in the notes under section 58, the definition of an anomalous mortgage is included in that section. In our opinion, this section should be confined to the rights and liabilities of parties to these mortgages.”—*Report of the Special Committee.*

527. Rights and liabilities:—In the case of an anomalous mortgage, the rights and liabilities of the parties should be determined by the contract as evidenced in the mortgage-deed. Thus, where according to the terms of an anomalous mortgage-deed, there was no provision for payment of interest after 4 years, *held* that interest was not claimable after that period—*Sundar Dei v. Thakur Baldeo*, 28 I.C. 161, 18 O.C. 10. The mortgagee may have a right to foreclose or to bring the property to sale according to the terms of the deed. If there is no provision in the deed for sale, the mortgagee has no right to bring the property to sale—*Madho Rao v. Ghulam*, 15 N.L.R. 134 (P.C.), 56 I.C. 717; *Gajadhar v. Sibananda*, 28 C.W.N. 532, A.I.R. 1924 Cal. 592, 81 I.C. 768. If the mortgage-deed provides both for foreclosure or for sale according to the option of the mortgagee, he can bring either a suit for foreclosure or a suit for sale; and in such a case, if he brings a suit for foreclosure, the mortgagor cannot compel him to accept a decree for sale, unless he (the mortgagor) proves by satisfactory evidence that the remedy sought for by the mortgagee is manifestly injurious to his interests—*Nawab Syed v. Balak Ram*, 18 I.C. 24 (Oudh).

A mortgage-deed contained the following terms: “As we have received Rs. 500, you will, in lieu of the said amount and interest, enjoy the said property for three years by virtue of *Arakattu Otti* on the condition that on the expiry of the said 3 years we should redeem the land without paying either principal or interest, and you will on the expiry of the said 3 years deliver possession without objection.” The mortgagee obtained possession of only a portion of the land. *Held* that on the expiry of the three years, the mortgagee was bound to deliver possession of that portion to the mortgagor, according to the terms of the deed, and was not entitled to retain possession of that portion on the ground that possession of the whole had not been given to him. His remedy was to sue for damages for breach of contract in not giving possession of the whole of the land—*Visvalinga v. Palaniappa*, 21 Mad. 1 (3). A usufructuary mortgage was made for four years, and it was covenanted “that the mortgagee will credit the profits towards the yearly interest. Should any deficiency arise, the mortgagor will pay the same from his own pocket, and the whole money, principal and interest, having been paid at the expiry of the term, the mortgaged property will be redeemed.” *Held* that as a term was fixed in the bond, it was not a purely usufructuary mortgage, but an anomalous mortgage; and the intention of the parties was

that if at the expiration of the four years the principal and interest were paid up by the mortgagor, the mortgage would be redeemed, but in the event of this not taking place either by reason of the profits having been insufficient to pay the mortgage-debt with interest or the mortgagor having failed to do so, the mortgage relations between the parties were to continue upon the same terms as theretofore—*Hikmatulla v. Imam Ali*, 12 All. 203 (205). A deed of anomalous mortgage contained a clause that in case of default of payment the mortgagee might bring a suit for sale, and in case the whole amount was not realised by the sale, he was to have a personal remedy against the mortgagor for the balance. The mortgagee brought a suit for a money-decree against the mortgagor. *Held* that the creditor could not rely on the personal covenant and get a simple money-decree as the covenant could be availed of only in a certain contingency (*viz.*, the insufficiency of the sale-proceeds to discharge the whole debt) which had not arisen—*Kalka v. Mathura Das*, 21 O.C. 341, 50 I.C. 220 (221).

It was held in certain Madras cases that since the rights of the parties are governed by the terms of the contract, any covenant agreed between the parties in a deed of anomalous mortgage must be enforced, even though it amounted to a clog on redemption—*Kuttikat v. Kunhikavamma*, 1918 M.W.N. 235, 43 I.C. 989; *Hakeem Patte v. Sheikh Davood*, 39 Mad. 1010; *Kandula Venkiah v. Donga Pallaya*, 43 Mad. 589 (598, 609) (F.B.), 57 I.C. 724. But this view has now been overruled by a Privy Council case. In this case, the mortgage-deed provided that the property was mortgaged for five years, that the mortgagor was to redeem at the end of the term, and that if he did not do so the mortgagee was to have the option of taking possession for a period of twelve years. If the mortgagee took possession, the mortgagor would not be entitled to redeem within 12 years. The mortgage-debt not having been paid at the end of five years, the mortgagee took possession; in the same year the mortgagor sued to redeem. The mortgagee contended that since he elected to take possession, the mortgagor was not entitled to redeem till after the expiry of twelve years. *Held* that even if it were an anomalous mortgage in which the rights and liabilities of the parties are determined by the agreement entered into between them, still such agreement cannot defeat the statutory right of redemption conferred by section 60. That section is unqualified in its terms and is not controlled by the provisions of sec. 98, and it lays down that a mortgagor has a right of redemption as soon as the principal money has become due. In the present case the mortgage is stated to be for five years, which means that the principal money becomes due after 5 years, and the mortgagor's right of redemption consequently accrued after the expiry of that period. This right cannot be defeated or postponed for 12 years by reason of the mortgagee taking possession. In other words, an agreement creating a clog on redemption cannot be enforced even in an anomalous mortgage—*Muhammad Sher Khan v. Raja Seth Swami Dayal*, 44 All. 185 (P.C.), 25 O.C. 8, 66 I.C. 853, A.I.R. 1922 P.C. 17.

Where the stipulation in the deed entails great hardship on the parties, and amounts to a penalty, it will be relieved against by the Court. See *Kottal Uppi v. Edavalath*, 6 M.H.C.R. 258.

Local usage:—As instances of local usage, mention may be made of *otti* and *kanom mortgages*, which according to the custom prevailing in

Malabar are not redeemable before 12 years from the date of their execution. See Note 348A under sec. 58.

99. [*Repealed by Act V of 1908.*]

See O. XXXIV, r. 14, C. P. Code in the Appendix.

Charges.

100. Where immoveable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

100. Where immoveable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained *which apply to a simple mortgage shall, so far as may be, apply to such charge.*

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust; *and save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.*

Amendment:—This section has been amended by sec. 50 of the T. P. Amendment Act (XX of 1929) for the following reasons:—

“Section 100 defines a charge, and the latter part of the section provides that all provisions relating to a mortgage and sections 81 and 82 shall apply in the case of a charge. This does not clearly show what exactly are the rights and liabilities of a charge-holder. It is true that a charge is distinguishable from a mortgage in that it does not amount to transfer of any interest in the property subject thereto (see Ghose on Mortgage, Vol. I, p. 110). We think it would be desirable to provide that the rights and liabilities of the parties in the case of a charge should be similar to the rights and liabilities of parties to a simple mortgage, as a charge resembles a simple mortgage more than any other kinds of mortgage. A charge-holder, like a simple mortgagee, has only a right to bring

the mortgaged property to sale; he cannot have a right of foreclosure (*see* Order XXXIV, rule 15 of the Civil Procedure Code).

"As a charge does not involve the transfer of an interest in the property subject thereto, it has been held that it cannot be enforced against a transferee for consideration without notice (I.L.R. 9 All. 591, 13 All. 28, 38 All. 254, 33 Cal. 985, 42 Cal. 849, and 19 C.W.N. 37). The contrary view was taken in some cases where a charge was created by a decree (2 All. 162, 28 All. 655). The former view appears to us more consistent with equity.

"As charges created by the operation of law or by a decree will not necessarily be registered, it is desirable to protect transferees for consideration without notice and provide that a charge will not be enforced against them."—*Report of the Special Committee.*

528. Mortgage and charge distinguished:—(1) A mortgage is a *transfer* of interest but a charge is not. This distinction has been fully set out in Note 327 under sec. 58.

(2) A charge may be created by act of parties or by operation of law; but a mortgage can be created only by act of parties.

(3) A simple mortgage carries a personal liability, unless excluded by an express contract. But the same rule does not apply to a charge, in fact the rule is opposite, because by the definition of a charge *no personal liability* is created. But where a charge is the result of a contract, there may be a personal remedy. Every case must depend upon its own facts—*Raghukul v. Pitam*, 52 All. 901, A.I.R. 1931 All. 99 (100), 130 I.C. 198; *Balasubramania v. Sivaguru*, 21 M.L.J. 562, 11 I.C. 629 (632); *Rama- brahman v. Venkatanarasu*, 23 M.L.J. 131, 16 I.C. 209 (210).

(4) A power to bring the mortgaged property to sale is given in a simple mortgage either expressly or by implication; but a charge does not contain any words to that effect—*Balasubramania*, (*supra*). If the date is specified, the property is specified, there is a covenant to pay, and there are words which indicate that the property is to be sold in case the debt is not paid, then the bond should be treated as creating a mortgage and not a mere charge—*Narayanasamy v. Ramasamy*, 12 L.W. 674, 60 I.C. 611 (613). But like a simple mortgagee a charge-holder has the right to bring the property to sale.

(5) A charge created by operation of law (*e.g.*, a charge created by a decree) does not require the formalities (*e.g.*, registration) prescribed by sec. 59 for a mortgage—*Gobinda v. Dwarka*, 35 Cal. 837 (841); *Maina v. Bachchi*, 28 All. 655 (660). (But a charge created by act of parties requires registration—*Maina v. Bachchi*, 28 All. 655, at p. 659.)

(6) As regards the relief granted, there is now no distinction between a charge and a simple mortgage.

A charge created for the payment of a legacy or an annuity or maintenance-money by a will or trust-deed is easily distinguishable from a mortgage—*Gobinda v. Dwarka*, 35 Cal. 837 (842).

The 'charge' referred to in sec. 65 of the Bengal Tenancy Act is not such a charge as that defined by sec. 100 of the Transfer of Property Act, and does not require to be enforced in the same manner. Thus, a landlord who has got a decree for arrears of rent of an under-tenure is not restricted to executing the decree by sale of the under-tenure in the first instance, but can execute it in the ordinary manner against the judgment-debtor's

person or other property, moveable or immovable—*Fotick v. Foley*, 15 Cal. 492; *Royzuddin v. Kali Nath*, 33 Cal. 985.

Charge and lien distinguished:—"Prior to the passing of the Transfer of Property Act, the distinction between 'charge,' 'lien,' 'incumbrance' and 'hypothecation' which is so familiar to English lawyers was not equally familiar to the Indian minds, nor did the words bear the same connotation to Indian as to English lawyers. Indeed, if we examine sec. 100, we shall even yet fail to find a definition of "charge" as contradistinguished from 'lien,' the former denoting a result of act of parties, while the latter is restricted to a liability arising by statute"—*Kishan Lal v. Ganga Ram*, 13 All. 28 (38).

(1) Thus, the main distinction between the two terms is that a 'charge' may be created by act of parties or by operation of law, whereas a 'lien' can arise only by operation of law. "A lien answering to the *tacita hypotheca* of the Civil Law, is a right conferred by law, and not by contract, upon one man to retain possession of or have a charge upon property real or personal belonging to another, until certain demands are satisfied. But in some works the word 'lien' is used to include not only liens arising by operation of law, but also charges or hypothecations arising out of contract; as where one agrees to give another a 'lien' on property."—Fisher on Mortgage, 5th Ed., p. 2.

(2) A "charge" in strictness not only empowers its possessor in many cases to hold the property charged, if in his possession, but also gives him the right to come into Court and sue actively for the satisfaction of his claim. A "lien" strictly is neither a *jus in rem* nor a *jus ad rem*, but is simply a right to possess and retain property until some charge attaching to it is paid or discharged. Story's Equity Jurisprudence, § 506, cited in *Kishan Lal v. Ganga Ram*, 13 All. 28.

(3) A charge is confined to immovable property; but a lien may be had in respect of moveables also..

529. Requisites of a charge by act of parties:—A charge does not contemplate any *transfer of an interest* in the immovable property. The substantial distinction between a mortgage and a charge lies in the fact that while in the case of a mortgage there is the transfer of the interest in the immovable property, there is no such transfer of interest in the case of a charge which merely secures payment of the money against specific property—*Gobinda v. Dwarka*, 35 Cal. 837 (841); *Siva Prasad v. Beni Madhab*, 1 Pat. 387 (392), A.I.R. 1922 Pat. 529, 70 I.C. 24; *Royzuddi v. Kali Nath*, 33 Cal. 985; *Nathan v. Durga*, 52 All. 985, A.I.R. 1931 All. 62 (64), 130 I.C. 489; *Narain v. Murli Dhar*, 6 O.W.N. 903, A.I.R. 1929 Oudh 539 (541), 121 I.C. 81. See Note 327 under sec. 58.

A document creating a charge on immovable property must be a document that creates such charge *immediately* on the execution, without operating as a charge at some *future* time. When the Legislature speaks of a charge under this section, it speaks of something which operates as a charge upon the land immediately as it is executed and not as a mere possibility of a charge—*Madho v. Sidh Binaik*, 14 Cal. 687; *Harjas Rai v. Naurang*, 3 A.L.J. 220; *Abdul Samad v. Municipal Committee*, 67 I.C. 939 (Lah.). A charge cannot be created on a future contingency. An ekrarnama which does not say that the properties mentioned therein remain liable for the allowance from the date of execution of the document but only says that if the allowance remains in arrear *in future*, the properties

may be sold for realisation of the same, cannot be said to create a charge—*Mohini v. Purna Sashi*, 36 C.W.N. 153, A.I.R. 1932 Cal. 451, 138 I.C. 24. Where a document, after reciting the receipt of a loan and the time for repayment, continued: "If I do not pay the money according to the stipulation, then I declare in writing that I shall lose my right to the said land. If I do not pay the money according to the promise, then the aforesaid Misser shall take possession of the land," *held* that the document did not create either a mortgage or a charge. All that it did create was the mere possibility of a charge—*Madho Misser v. Sidh Binaik*, 14 Cal. 687. Similarly, where a sale-deed contained a covenant to the following effect: "If, *in future*, any person appears as a claimant of the property sold and makes a claim, in consequence of which there is an injury to the property sold, or we do not give possession, then the purchaser may recover the money from our person or the property sold or any other property," it was *held* that the covenant did not create a charge in favour of the purchaser—*Harjas Rai v. Naurang*, 3 A.L.J. 220. But the Madras High Court holds that an instrument, by which a liability not existent *in praesenti* but which will arise, if at all, *in future* is secured, may create a present charge within the meaning of this section. Thus, where in a partition deed between the members of a joint family, it was provided that if owing to the default of two of the dividing co-parceners the debts which they had undertaken to pay should have to be paid by the others, then the persons who paid should recoup themselves out of the properties allotted to the defaulting parties, *held* that it created a present charge within the meaning of this section—*Imbichi v. Achampat Avupaya*, 33 M.L.J. 58, 39 I.C. 867. A valid charge can be created on the happening of a condition, where the condition itself is first stipulated, and the condition happens afterwards—*Balasubramania v. Sivaguru*, 21 M.L.J. 562, 11 I.C. 629 (632). See also *Cooling v. Saravana*, 12 Mad. 69.

In a document creating a charge the form of words used is immaterial. Where from the circumstances of a transaction, the document shows an intention to make the land as security for the payment of the money mentioned therein, the document creates a charge—*Janardan v. Anant*, 32 Bom. 386 (390). Whether a document creates a charge or not, must depend upon the construction to be placed on the document. To create a charge, it is not necessary to employ any technical terms; where the intention of the parties was to indicate in unambiguous language that a definite fund should be employed for the discharge of a particular debt or claim, and there is no ambiguity either as to the amount of the debt or the amount of the fund out of which the debt has to be satisfied, the transaction amounts to a charge—*Nathan v. Durga*, 52 All. 985, A.I.R. 1931 All. 62; *Maina v. Bachchi*, 28 All. 655 (658); *Narain v. Murli Dhar*, 6 O.W.N. 903, A.I.R. 1929 Oudh 539 (540), 121 I.C. 81.

A charge is created if the language is definite though wide. In construing words describing property a distinction should be drawn between wideness of language and vagueness or indefiniteness of language. Where in a partition deed it was stipulated that one of the parties should discharge a certain debt, and, in default, it was provided that, if either of the parties should fail to observe any of the provisions of the deed, the party in default should pay to the other party, who should have sustained loss, twice the amount from their properties; *held* that the word "properties" referred to the properties mentioned in the schedules to the deed, and consequently there was no indefiniteness. The words were sufficiently

apt to create a charge—*Manickam v. Audinarayana*, 34 Mad. 47, 5 I.C. 917. Where a bond runs thus: "To secure this money, I pledge voluntarily and willingly my wealth and property in favour of the said banker. Whatever property, etc., belonging to me be found by the said banker, should be available to him," *held* that the words were sufficiently specific and certain to include all the property of the obligor—*Ramsidh v. Balgobind*, 9 All. 158. But a promise by the debtor to pay out of his property indefinitely, or an indefinite order for the satisfaction of a decree out of the assets of a deceased person in whosoever hands they may be found, does not create any charge on any specific property—*Bheri Dorayya v. Moddi-patu*, 3 Mad. 35. So also, a bond which provides for the realisation by the creditor of the principal and interest "out of my moveable and immoveable property, my own *milk*" is too vague to create a mortgage or a charge on any definite estate—*Collector v. Beti Maharani*, 14 All. 162. But where an *ekrarnama* provided that in the event of the executant not paying the maintenance the obligee was at liberty to proceed against the properties relinquished by her, and in case she was unable to realise the arrears from those properties she might have recourse to the other properties of the obligor, but *no particular or specific property* was mentioned as liable for the claim, the deed could not be construed as creating a charge—*Mohini v. Purna Sashi*, 36 C.W.N. 153, A.I.R. 1932 Cal. 451, 138 I.C. 24.

In order to create a charge, it is necessary that the property should be made security (*i.e.*, *sufficient security*) for the payment of money. Thus, during the pendency of an appeal, the appellant offered, as security for stay of execution of the decree against him, a property which was worth Rs. 4,000. The amount of the decree and costs came up to Rs. 6,000. *Held* that the respondent decree-holder did not have a charge on the property for his judgment-debt, as the property was not a *sufficient security* for the payment of the decretal amount—*Somasundaram v. Nachiappa*, 2 Rang. 429 (435), A.I.R. 1925 Rang. 55, 84 I.C. 302.

A charge must be created in favour of a particular *person* specifically named. A security bond for refund of sale-proceeds in case of a reversal of decree in Appellate Court does not amount to a charge, because the undertaking is given to the Court, but the Court is not a juridical person, and it can neither sue nor take the property nor assign it—*Mehdi Ali v. Chunni Lal*, 1929 A.L.J. 902, A.I.R. 1929 All. 834 (836), 119 I.C. 81.

Writing and Registration:—There is nothing in this Act which requires the registration of charges, nor indeed which requires that charges shall be created by a document. A charge can be created without any written instrument at all, and even if it is in writing, it need not be registered, for the Registration Act does not insist upon the registration of all documents by which a charge may be created. Thus, a will creating a charge need not be registered—*Parbhu Dayal v. Babban*, 1 O.L.J. 43, 23 I.C. 867 (869). But the Allahabad High Court is of opinion that the provisions as to registration contained in the Registration Act and Transfer of Property Act apply to charges (when created by act of parties) just as much as to mortgages—*Maina v. Bachchi*, 28 All. 655 (659). Both these observations are however obiter. The law in this respect is thus stated by Sir Rash Behary Ghose: "It is worthy of notice that a charge may be created *orally*, although if it is created by an instrument in writing, it must be registered, unless made by a will or the amount secured is less than one hundred rupees"—*Law of Mortgage*, 5th Edn., p. 157. See also *Gour's Law of Transfer*, 6th Edn., p. 1400, § 2444.

But the special provisions of the T. P. Act relating to the *attestation* of mortgages do not apply to a charge, and even if it is attested, the provisions of the Evidence Act relating to the method of proof of mortgages, are not applicable thereto—*Ramaswami v. Kuppuswami*, 14 L.W. 99, 66 I.C. 554, A.I.R. 1921 Mad. 514.

530. Charge by act of parties—Instances:—In a suit for recovery of money due on baki khata accounts, a compromise was come to and a petition was filed requiring the defendants to pay a certain sum of money together with interest by instalments to the plaintiff, and further declaring that the immoveable properties specified therein shall be deemed to be hypothecated for the realisation of the money. *Held* that the parties intended to create a charge—*Govinda Chandra v. Dwarka Nath*, 35 Cal. 837 (844), 12 C.W.N. 849. Where a document provided that the amount was to be paid in easy instalments and stipulated that the debtor would not alienate a specified property until the satisfaction of the debt, *held* that the property was made security for the payment of the debt, as the stipulation intended to preserve the property intact so as to be available for realisation of the amount. Consequently a charge was created on the property—*Narain v. Murli Dhar*, 6 O.W.N. 903, A.I.R. 1929 Oudh 539 (540), 121 I.C. 81; *Jawahir v. Indomati*, 36 All. 201 (*per* Richards, C.J.); *Royzuddi v. Kali Nath*, 33 Cal. 985. Defendants borrowed money from the plaintiff for starting a factory. An agreement was entered into which provided that in certain events the properties of the factory would be liable for certain moneys and that in certain other contingencies the lender would be at liberty to recover a certain amount from the machinery of the factory or from the borrowers. A promissory note was also passed in favour of the plaintiff. *Held* that the agreement amounted to an equitable charge on the property (factory)—*Amratlal v. Keshavlal*, 28 Bom.L.R. 939, A.I.R. 1926 Bom. 495, 98 I.C. 696. Where the mortgagee, after executing a mortgage for a village executed a further document in which he recited, "I shall first pay off this debt, including principal and interest, and thereafter I can redeem the mortgaged village, having paid up the mortgage-money. Without the payment of this debt, I cannot redeem the mortgaged village," *held* that the intention of the executant was that the debt created by this document was a further charge on the village—*Aditya v. Ram Ratan*, 5 Luck. 365 (P.C.), 57 I.A. 173, 34 C.W.N. 625 (627), 123 I.C. 191, A.I.R. 1930 P.C. 176, 59 M.L.J. 342, 28 A.L.J. 646; *Janardan v. Anant*, 32 Bom. 386 (390). A document stating "I have willingly fixed an annual allowance of Rs. 100 in cash in perpetuity out of the profits of the said village for my eldest brother" creates a valid charge—*Kanhai Lal v. Muhammad Hussain*, 5 All. 11. A will devising immoveable properties and directing the devisee to pay certain debts of the testator from these properties creates a charge on them in respect of those debts—*Girish Chunder v. Anundamoyi*, 15 Cal. 66 (P.C.). An agreement called a sanad and attested by witnesses, by which a Hindu agrees to pay to his sister, and after her death, to her daughter, a fixed sum every three years out of the proceeds of an estate inherited by him from his maternal grand-mother, creates a valid charge on the produce of the estate, and the heir of the grantor takes it subject to this charge—*Chalamanna v. Subbama*, 7 Mad. 23. Similarly, where an allowance had been enjoyed for more than three quarters of a century and had been received during all that time out of certain lands, with the acquiescence of the successive owners thereof, it

implied a valid grant of the allowance in perpetuity and that it was charged on those lands—*Manavikrama v. Gopalan*, 30 Mad. 203.

531. Charges by operation of law:—"These charges are founded upon the consideration of a duty or implied intention on the part of the owner to make it answerable for a specific claim." See Fisher on Mortgage, 5th Ed., sec. 504. A charge by operation of law results *not* by volition of the parties, but as the result of a legal obligation. Such charges are known as equitable liens in English law—*Syud Nadir v. Baboo Pcaroo*, 19 W.R. 255. A charge can be created either by act of parties or by operation of law. If the parties cannot by mutual consent agree to create a charge, it is open to the Court, as a Court of equity, to create such a charge in order to secure to the person the right to which he is entitled, in an effective manner—*Kanhaiya Lal v. Jangi*, 24 A.L.J. 649, A.I.R. 1926 All. 527 (529), 96 I.C. 39.

Instances:—(a) Vendor's charge for unpaid purchase-money; see sec. 55 (4);

(b) Where several properties are liable for the payment of an annuity and the owner of one of such properties has discharged the whole liability, he acquires thereby a charge on the other properties—*Yakub v. Kishen*, 28 All. 743.

(c) Sec. 228 of the Calcutta Municipal Act makes the consolidated rate as it accrues from time to time a charge on the property—*Akhoy v. Corporation of Calcutta*, 42 Cal. 625, 27 I.C. 261.

(d) A party entitled to claim contribution under sec. 82 acquires a charge in respect thereof. See Note 497 under sec. 82.

(e) The plaintiff agreed to advance money to the defendant company up to a certain limit upon the security of the stock in trade and immovable property of the company which were to be mortgaged to the plaintiff. He made certain advances and agreed to perform the rest of the promise, being always ready and willing to pay the balance. *Held* that the agreement created a charge in favour of the plaintiff, on the assets of the defendant company when it went into liquidation—*Hukmichand v. Pioneer Mills, Ltd.*, 2 Luck. 299, A.I.R. 1927 Oudh 55 (58), 99 I.C. 483.

(f) Where a usufructuary mortgage contained a stipulation that if the creditor was dispossessed in any way, he would be able to realise his dues from some other property of the mortgagor, *held* that this stipulation created a charge, though it could be enforced on the happening of a contingency—*Murat Singh v. Pheku*, 7 Pat. 584, A.I.R. 1928 Pat. 587 (588), 110 I.C. 526, 9 P.L.T. 743.

Charge created by award of arbitrators:—An arbitrator was chosen by parties to make a partition. The arbitrator awarded a house and some shops to the plaintiff, and another house and other shops to the defendant, and as they were of unequal value, he directed that the lots should be equalised by the defendant paying Rs. 1,400 to the plaintiff as compensation for the deficiencies of the property allotted to him, within a month, and that if no such payment was made the latter would be entitled to claim interest at a certain rate, and that the payment of the said amount would be a charge on the shop allotted to the defendant. *Held* that a valid charge was created—*Kanhaiya Lal v. Jangi*, 24 A.L.J. 649, 96 I.C. 39, A.I.R. 1926 All. 527.

Registration:—A charge created by operation of law (*e.g.*, a charge

created by a decree) does not require registration—*Maina v. Bachchi*, 28 All. 655 (660); *Gobinda v. Dwarka*, 35 Cal. 837 (841).

Charge created by decree:—A charge created by decree, *e.g.*, where a decree makes maintenance a charge on specified properties, the decree-holder is entitled to realise the maintenance by executing the decree, without having recourse to any suit—*Abdul Muhammad v. Seetha Lakshmi*, 33 L.W. 109, A.I.R. 1931 Mad. 120 (122). See also *Ambalal v. Narayan*, 43 Bom. 631; *Minakshi v. Chinnappa*, 24 Mad. 689; *Indramani v. Surendra*, 35 C.L.J. 61, A.I.R. 1922 Cal. 35; *Bhoje Mahadev v. Gangabai*, 37 Bom. 621, 21 I.C. 54 (55); *Hari Sankar v. Tapai*, 4 Pat. 693, A.I.R. 1926 Pat. 31; *Sabitri v. Mrs. Savi*, 12 Pat. 359, A.I.R. 1933 Pat. 306.

532. Cases in which no charge is created:—A co-sharer who has paid the whole revenue and thus saved the estate from sale does not, by reason of such payment, acquire a charge on the shares of the other co-sharers—*Kinu Ram v. Muzaffar*, 14 Cal. 809 (F.B.); *Khub v. Pudmanund*, 15 Cal. 542; *Seth Chittor v. Shib Lal*, 14 All. 273 (F.B.); *Shivrao v. Pundlick*, 26 Bom. 437; *Bhubaneshwari v. Munir Khan*, 7 Pat. 613, 9 P.L.T. 573, 111 I.C. 84, A.I.R. 1928 Pat. 641 (649). The Madras High Court, however, holds that such payment creates a charge—*Raja of Vizianagram v. Raja Setrucherla*, 26 Mad. 686 (F.B.); *Alakayammal v. Subbarayya*, 28 Mad. 493; *Puthen Purayil v. Mangalasuri*, 36 Mad. 493; but such charge can only avail against the property as it stood on the date of payment and cannot avail retrospectively, *i.e.*, the co-sharer is not entitled in respect of his charge to priority over prior encumbrancers and persons who have in good faith and without any suspicion that a charge may come into future existence advanced money on the property—*Vyaperumal v. Alagappa*, 55 Mad. 468, A.I.R. 1932 Mad. 177, 135 I.C. 609.

If a mortgagor, after executing a mortgage, takes a subsequent loan from the mortgagee under a simple money-bond, and in that bond stipulates that he will not redeem the mortgage without paying off the subsequent loan, the simple money-bond does not create any charge on the property, and consequently the stipulation cannot be enforced. The mortgagor will be entitled to redeem the mortgage without paying off the amount due under the money-bond. See Note 379 under sec. 61.

In a partition suit the parties entered into a compromise-decree by which certain properties were given to certain branches to which also were allotted some debts, and then it was provided that until the said debts were fully discharged, the properties allotted to the several persons should be liable in the first instance. *Held* that the compromise merely contained a contract of indemnity between the *parties themselves*, conferring no benefit on the *creditors*, and that the latter not being parties to the contract could not sue to enforce the same, because the compromise neither created a trust for the creditors nor a charge in their favour—*Suryanarayana Rao v. Basivireddy*, 55 Mad. 436, 62 M.L.J. 533, A.I.R. 1932 Mad. 457. Where one co-heir takes upon himself to save the property of the deceased from Court sale in execution of a decree passed against all the co-heirs, no charge is created in favour of the co-heir making the payment, especially when the payment is made without the knowledge or consent of the other co-heirs—*U Shwe Bwa v. Maung Thauk*, 6 Rang. 500, A.I.R. 1928 Rang. 278 (280), 113 I.C. 801. A co-sharer paying off the amount of the rent decree and the auction purchaser's fees, and getting a sale set aside under sec. 174 of the Bengal Tenancy Act, does not acquire a charge on the shares of the

defaulting co-tenants—*Gopi v. Ishur*, 22 Cal. 800. Where one of the two persons having a joint holding from a mittadar, paid the whole of the mittadar's dues for certain years, such payment did not create a charge on the land—*Thanikachella v. Sudachella*, 15 Mad. 258.

An agreement to execute a mortgage is not by itself a mortgage under sec. 58, nor even a charge under sec. 100—*Hukumchand v. Radha Kishen*, 34 C.W.N. 506 (511) (P.C.), A.I.R. 1930 P.C. 76, 123 I.C. 157; *Ram Hait v. Pohkar*, 7 Luck. 237, A.I.R. 1932 Oudh 54 (56), 134 I.C. 1093.

533. "And the transaction does not amount to a mortgage":—There is a defect in the language of this section. It maintains a distinction between a mortgage and a charge—a distinction without important consequences—without in any way exhibiting the *differentia*. This section recognises that by the act of parties immoveable property may be made security for the payment of money in ways which do not amount to a mortgage, but it does not limit or define those ways—*Imperial Bank of India v. Bengal National Bank*, 57 Cal. 328, 34 C.W.N. 605 (613, 615), 127 I.C. 760, A.I.R. 1930 Cal. 536. The words "and the transaction does not amount to a mortgage" signify that if the relation created by the instrument is not that of mortgagor and mortgagee, and immoveable property has been made security for the payment of money, there is a charge on the property. The words do not mean that if the transaction on the face of it purports to be a mortgage, but the instrument is not operative as such by reason of defective execution or non-compliance with the formalities prescribed by law (*e.g.*, stamp, registration, attestation) the transaction is converted into a charge. "Equity will not contravene the positive enactments or requirements of law and defeat its policy by supplying under the guise of amending defective instruments, those deficient elements of form, without which the agreement is absolutely void"—*per* Mookerjee, J. in *Royzuddin v. Kali Nath*, 33 Cal. 985. As to the distinction between a mortgage and a charge, see Note 327 under sec. 58.

Therefore, an instrument which cannot operate as a mortgage for want of due attestation, as required by sec. 59, does not operate as a charge under this section—*Debendra v. Behari*, 16 C.W.N. 1075; *Samoo Patter v. Abdul Samad*, 31 Mad. 337; *Anantarama v. Yussujzi*, 31 M.L.J. 133; *Pran Nath v. Jadu*, 31 Cal. 729; *Collector of Mirzapur v. Bhagwan Prosad*, 35 All. 164 (F.B.); *Maharaja Ram Narain v. Adhindra*, 44 Cal. 388 (P.C.); *Khemchand v. Malloo*, 10 N.L.R. 81, 26 I.C. 601; *Kumari Bibi v. Srinath*, 1 C.W.N. 81; *Pribhdas v. Saheb Khan*, 18 S.L.R. 282, A.I.R. 1926 Sind 88, 93 I.C. 660; *Official Receiver v. Tirathadas*, 97 I.C. 321, A.I.R. 1927 Sind 66 (75); *Narayan v. Lakshmandas*, 7 Bom.L.R. 934; see Note 355 *ante*. So also, a mortgage is not converted into a charge by reason of non-compliance with the formalities of registration, prescribed by sec. 59—*Ma Bon v. Maung Po*, 32 I.C. 595, 8 L.B.R. 553; *Maung Tun v. Maung Aung Dun*, 2 Rang. 313 (318); *Somasundaram v. Nachiappa*, 2 Rang. 429 (436), A.I.R. 1925 Rang. 55, 84 I.C. 302. An equitable mortgage by deposit of title-deeds is invalid if it is not executed in any of the towns specified in section 59; and it cannot operate even as a charge under section 100—*Konchadi v. Siva Rao*, 28 Mad. 54.

In other words, if an instrument is expressly stated to be a mortgage, and gives the power of realisation of the mortgage money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution are wanting will not convert

the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realisation of money from a particular property without reference to sale, it creates a charge—*Gobinda Chandra v. Dwarka*, 35 Cal. 837 (842), 12 C.W.N. 849.

On the same principle, a sale which is invalid because of non-compliance with sec. 54 as to registration does not operate to give the purchaser a charge for the amount of the sale-price against the seller's estate. Section 100 was never intended to indemnify people who endeavour to get conveyances in violation of the express provisions of law—*Ma Lan v. Maung Shwe*, 4 Bur.L.T. 115, 10 I.C. 919.

534. Enforcement of charge against purchaser without notice:—One important point of distinction between a mortgage and a charge is that while a mortgagee can follow the mortgaged property in the hands of any transferee from the mortgagor, irrespective of notice, a charge can be enforced against a transferee only if it is shown that he has taken with notice of the charge. In other words, a charge cannot be enforced against a *bona fide* purchaser for value who was not aware of the charge—*Roy-uddi v. Kali Nath*, 33 Cal. 985 (993); *Akhoy v. Corporation of Calcutta*, 42 Cal. 625 (636); *Mohini v. Purna Sashi*, 36 C.W.N. 153; *Kishan Lal v. Ganga Ram*, 13 All. 28 (44); *Gur Dayal v. Karam Singh*, 38 All. 254 (258); *Prabhu Dayal v. Baban Lal*, 1 O.L.J. 43, 23 I.C. 867 (869); *Hunter v. Nisar Ahmad*, 8 Luck. 168, A.I.R. 1933 Oudh 336 (340). Contra—*Srinivasa v. Ranganatha*, 36 M.L.J. 618, 51 I.C. 963 where it is said that a purchaser without notice of the charge takes the property subject to the charge; see also *Mahadeo v. Anandi Lal*, 47 All. 90, 22 A.L.J. 887, 92 I.C. 348, A.I.R. 1925 All. 60, *Fateh Ali v. Gobardhan*, 5 Luck. 172, A.I.R. 1929 Oudh 316, 117 I.C. 405, and *Molloya v. Krishnaswami*, 47 M.L.J. 622, 85 I.C. 855, A.I.R. 1925 Mad. 95 (105), where the same view is taken. In an Allahabad case it was held that if the charge was created by a *decree of Court*, it could be enforced against a *bona fide* transferee for value without notice—*Maina v. Bachchi*, 28 All. 655 (659).

The amendment made at the end of para 2 makes it clear that no charge can be enforced against a transferee for value without notice, whether the charge is created by act of parties or by decree of Court. See the *Special Committee Report* cited at pp. 541-542 *ante*.

If the charge is created by a *registered* instrument, the registration amounts to *notice*, and a purchaser of the property takes it subject to the charge—*Nathan v. Durga*, 52 All. 985, 1930 A.L.J. 1267, A.I.R. 1931 All. 62 (64), 130 I.C. 489. Thus, a stipulation in a registered lease to the effect that the lessee should deduct from the annual rent certain portion as repayment of a sum of money already borrowed by the lessor from him, creates a charge on the property leased and not merely a personal covenant. If, therefore, subsequent to the execution of the lease, a creditor of the lessor obtains a money-decree against him and at auction-sale purchases the property leased out, he purchases it only subject to the charge created by the stipulation in the lease (the *registered* lease amounting to *notice* of the charge)—*Nathan v. Durga*, *supra*.

The holder of a charge on a property is entitled to enforce the same against the transferee of the property with notice, even though the transferee has purchased only a part of the property. If he is obliged to satisfy the full amount of the charge, his remedy is a suit for contribution against

the owners of the remaining portion of the property—*Hunter v. Nisar*, supra.

535. Para 2:—The second para must be read as referring to sec. 32 of the Indian Trusts Act, which lays down the following rules for re-imbursement by the trustee of all expenses made by him in execution of his trust:—

“Every trustee may re-imburse himself or pay or discharge out of the trust property all expenses properly incurred in or about the execution of the trust, or the realisation, preservation, or benefit of the trust property or the protection or support of the beneficiary.

“If he pays such expenses out of his own pocket, he has a first charge upon the trust property for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust property without previous payment of such expenses and interest.

“If the trust property fail, the trustee is entitled to recover from the beneficiary personally, on whose behalf he acted and at whose request express or implied, he made payment, the amount of such expenses.”

A trustee of a mosque making advances out of his own pocket to meet the expenses of the mosque cannot enforce his charge against the trust property by bringing a suit for sale. He can sue only for recovery of the money—*Abkan Sahib v. Soran*, 38 Mad. 260; *Peary v. Narendra*, 37 Cal. 229 (P.C.).

The expenses incurred by the trustee are a first charge or lien upon the *corpus* of the estate—*Ex parte James*, 1 Dow & Cl. 272; *Re Exhall Coal Co.*, 35 Beav. 449; but the Court of Law will not order the trustee's lien to be realised by giving a decree for foreclosure or sale, for it would have the effect of destroying the trust estate. The proper course for such realisation is to deliver the deeds into his custody, and to issue a prohibition against any disposition of the property without previous discharge of the trustee's lien—*Darke v. Williamson*, 25 Beav. 622.

101. Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist or such continuance would be for his benefit.

101. Any mortgagee of, or person having a charge upon, immoveable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the

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No merger
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same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

This section has been redrafted by sec. 51 of the T. P. Amendment Act (XX of 1929) for the following reasons:—

“Section 101 relates to the principle of “merger” and provides that if a mortgagee or the charge-holder of property acquires the interest of the mortgagor or the owner, his own mortgage or charge is extinguished, unless he expressly reserves the continuance of such mortgage or charge or unless such continuance is held to be for his benefit. As stated in an American case, ‘the doctrine of merger springs from the fact that when entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he has been seised in fee simple. But if there is an outstanding or intervening title, the case is different. It has, therefore, been expressly enacted in America that a mortgage is never merged if there is an outstanding incumbrance.’ (Jones on Mortgage, Vol. II, pp. 401 to 403, 7th Edn.). In *Toulmin v. Steere* (3 Mer. p. 210), it is held that the purchaser of an equity of redemption with notice of subsequent incumbrances stands in the same situation as if he himself had been the mortgagor, and cannot set up against such subsequent incumbrances either a prior mortgage of his own or a mortgage which he may have paid off. A purchaser of the equity of redemption can easily take steps to defeat the effect of *Toulmin’s case* by simply stating that the original debt paid off subsists for his benefit. The rule in *Toulmin’s case* has been embodied in section 101, but the decision in that case has been more than once questioned in English Courts (*See 2 W. & T. L. C.*, p. 49, 8th Edn.). In *Thorne v. Cann*, (1895) A.C. p. 11, Lord Herschell observed with regard to *Toulmin’s case* as follows:—‘A case which has certainly not met with universal acceptance and it has often been commented upon and criticised adversely.’ In the same case Lord Macnaghten said:—‘The authority of that case cannot now-a-days be treated as going beyond the actual decision.’

“In several cases the Privy Council has laid it down that in each case it will depend on the intention of the parties whether a particular charge or incumbrance was extinguished or subsisted (10 I.A. 62, 9 Cal. 961; 11 I.A. 126, 10 Cal. 1035; 29 I.A. 9, 29 Cal. 154; and 39 I.A. 68, 39 Cal. 527). In *Gokuldoss v. Rambux*, 11 I.A. 126, at p. 133, Sir Richard Couch, after reviewing the Indian decisions on the point which followed the rule in *Toulmin’s case*, observed:—

“The doubts as to that case (*Toulmin v. Steere*) or the propriety of introducing the doctrine of it into India as a rule of justice, equity, and good conscience, do not seem to have been considered by the High Court at Calcutta or Bombay.

“The doctrine of *Toulmin v. Steere* is not applicable to Indian transactions except as the law of justice, equity, and good conscience.

And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did it could not be excluded or defeated by declarations of intention or formal devices of conveyancers, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable.

'In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin v. Steere* seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation.'

"In a recent case in *Malireddi Ayyareddi v. Gopala Krishnayya*, I.L.R. 47 Mad. 190, the Privy Council has again remarked as follows:—

'It is now settled law that where in India there are several mortgages on a property the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee.'

"We propose to give effect to the long course of decisions both in England as well as of the Judicial Committee referred to above. It may generally be taken to be the intention of a creditor, and to his benefit, to keep his own incumbrances, as well as those which he has paid off, alive against subsequent incumbrances. We propose accordingly to amend the present section."—*Report of the Special Committee*.

Thus, under the old section, 'extinguishment' was the rule, and 'keeping alive' was the exception (although this rule was rarely followed). Under the new section, 'keeping alive' is the rule.

This amended section has retrospective effect—*Tota Ram v. Ram Lal*, 54 All. 897 (F.B.), A.I.R. 1932 All. 489 (492), 139 I.C. 107.

536. Principle of "keeping alive":—In the earlier part of the old section it was stated that when a mortgagee acquired the equity of redemption in his security, the *general rule was that the mortgage was extinguished*, and the onus was thrown on the mortgagee to prove that it was to his interest to keep the charge alive and that that was his intention at the time of the transaction—*Bai Rewa v. Vali Mohamed*, 46 Bom. 1009 (1014), 70 I.C. 912, A.I.R. 1922 Bom. 211; *Darshan Singh v. Arjun*, 1 Luck. 560, 3 O.W.N. 741, A.I.R. 1926 Oudh 606 (607), 98 I.C. 28.

But in spite of the express words of the earlier part of the section, and in spite of the rule laid down in *Toulmin v. Steere*, 3 Mer. 310, on which it was based, it was held in a majority of cases that in such circumstances the Court would presume that it was to the benefit of the mortgagee to keep the charge alive and that the mortgagee intended to keep it alive. That is, the Courts laid more stress on the latter part of the section than on the earlier part.

In *Toulmin v. Steere*, 3 Mer. 310 it was laid down that the purchaser of an equity of redemption who paid off a prior mortgage out of

the purchase-money and had taken a conveyance of the estate from the mortgagee, could not set up that mortgage as against a subsequent mortgagee who had taken subject to the prior mortgage. But this inflexible rule, being based on no intelligible principle, was never followed in India, and has been adversely commented on in several cases, even in England. See *Manks v. Whiteley*, [1911] 2 Ch. 488 (*per* Parker, J.). It has been observed by the Judicial Committee and the Indian High Courts that the question to be asked in each case would be—what was the *intention* of the party paying off the charge? He had a right to extinguish it, and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be presumed to have acted according to his interest—*Gokaldas v. Puranmal*, 10 Cal. 1035 (P.C.); *Mahesh Lal v. Mohant Bawan Das*, 9 Cal. 961 (977) (P.C.); *Ibrahim Hossein v. Ambica Prosad*, 39 Cal. 527 (P.C.); *Thorne v. Cann*, (1895) A.C. 11 (19); *Ayyareddi v. Gopalakrishnayya*, 47 Mad. 190 (195) (P.C.); *Mehr Singh v. Amar Nath*, 7 Lah. 212, 94 I.C. 152; *Fakiraya v. Gadigaya*, 26 Bom. 88; *Dinobandhu v. Jogmaya*, 29 Cal. 154 (P.C.); *Jamiunnissa v. Pitambardas*, 11 A.L.J. 127, 18 I.C. 704; *Hari Narayan v. Hari Prasad*, 12 A.L.J. 470, 23 I.C. 827; *Mahalakshammammal v. Sriman Madhwa*, 35 Mad. 642; *Shankar v. Sadasiv*, 38 Bom. 24 (31); *Gauri Sankar v. Bahadur*, 6 P.L.T. 385, A.I.R. 1925 Pat. 605 (607); *Baij Nath v. Daleep Narain*, 1 P.L.T. 582, 58 I.C. 489; *Tiruvengadam v. Satapathi*, 49 M.L.J. 361, A.I.R. 1925 Mad. 1217, 90 I.C. 767; *Baldeo v. Dy. Commissioner*, 10 O.L.J. 112, A.I.R. 1924 Oudh 1 (9), 74 I.C. 503; *Bansidhar v. Jagmohan*, 3 Luck. 472, A.I.R. 1929 Oudh 88 (89), 110 I.C. 79. “The mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it”—*per* Jessel, M.R. in *Adams v. Angell*, (1877) 5 Ch. D. 634.

Thus, it has been held that a mortgage is not necessarily destroyed where the incumbrancer buys the property which is subject to his charge, though he takes no distinct steps to keep it alive. It is not a sound proposition that because the mortgagee purchases the equity of redemption, it necessarily causes a merger of the mortgagee's interest. The mortgagee is entitled to assert his right as mortgagee and may claim that his mortgage-interest has been kept alive, as this is for his benefit—*Mangtulal v. Upendra*, 57 Cal. 82, A.I.R. 1930 Cal. 335 (337), 125 I.C. 661. Where a prior mortgagee purchased the property mortgaged to him, this section would protect him from the claims of puisne incumbrancers, for it was clearly for his benefit, when he became the absolute owner of the property, that his prior charge should be kept alive—*Baldeo v. Uman Shankar*, 32 All. 1 (3). Where a mortgagor sells his equity of redemption to a first mortgagee with possession, after the creation of a second mortgage over the properties, the first mortgagee is entitled to keep his incumbrance alive as against the second mortgagee, though it does not continue against the owner whose equity of redemption the first

mortgagee had purchased—*Ibrahim Sahib v. Arumugathayee*, 38 Mad. 18. On a mortgagee purchasing the mortgaged property along with other properties and jointly with other persons in undivided shares, his mortgage lien is not extinguished by the purchase. The mortgage should be regarded as existing, it being evidently for the benefit of the mortgagee that it should be so regarded—*Gunindra v. Baijnath*, 31 Cal. 370. Where a prior mortgagee purchases the equity of redemption in execution of a money decree against the mortgagor, he is presumed to keep alive his mortgage against the puisne mortgagees, who will have to redeem him—*Ram Sarup v. Ram Lal*, 44 All. 659, 20 A.L.J. 596, 75 I.C. 472, A.I.R. 1922 All. 394. Under the amended section, the purchase by the mortgagee of the equity of redemption has in itself the effect of keeping alive the prior mortgage, and the *intention* to do so need not be proved nor presumed; nor is it necessary to consider whether the continuance of the incumbrance would be to his benefit.

Where a third mortgagee (or a purchaser) professes to keep in his hands a part of the consideration in order to pay off the first and the second mortgages, but he pays off only the first mortgage, then in a suit by the second mortgagee to enforce his mortgage it is open to the third mortgagee (or the purchaser) to insist on his being treated as a first mortgagee whose mortgage must be paid off before the second mortgagee can bring the property to sale—*Tota Ram v. Ram Lal*, 54 All. 897 (F.B.), 139 I.C. 107, A.I.R. 1932 All. 489 (491); *Bapu v. Venkatachalapathi*, 64 M.L.J. 606.

A prior mortgagee, by purchasing the rights of a puisne mortgagee, does not lose the rights which had been secured to him by the prior mortgage. In such cases the presumption is that he intended to keep alive the prior security and would be entitled to fall back upon it in case of necessity—*Fateh Ali v. Gehna*, 9 Lah. 88, A.I.R. 1928 Lah. 301 (303), 112 I.C. 17. If a mortgagee of two properties purchases one of them in discharge of his mortgage, unaware of a subsequent mortgage of both the properties in favour of another, he must be deemed to have kept his own mortgage alive and is entitled to use it as a shield against the subsequent mortgagee—*Abdul Majid v. Arunachala*, 61 M.L.J. 857, 136 I.C. 305, A.I.R. 1932 Mad. 84 (85).

The principle of this section applies not only where the mortgaged property is purchased by the prior mortgagee or charge-holder, but also extends to cases where the property is purchased by a *third person*. And so, where the mortgaged properties are sold to a third person, and the sale-proceeds are devoted to paying off prior encumbrances, and the circumstances at the time of the sale are such that it is for the benefit of the purchaser that the mortgages involved in the purchase should not be extinguished, it must be held that they enure for the benefit of the purchaser, and that he will be entitled to priority over puisne mortgagees—*Natchiappa v. Ko Tha*, 6 Rang. 488, A.I.R. 1928 Rang. 287 (288), 113 I.C. 809; *Nangunni Kovillamma v. Nedungadi*, 31 L.W. 165, A.I.R. 1929 Mad. 860 (861).

537. Puisne mortgagee paying off prior mortgage:—Where a subsequent mortgagee redeems a prior mortgage, he becomes entitled to the position of the mortgagee redeemed, and he can keep alive the prior mortgage that he has paid off, if it suits his purpose to do so—*Chhotu Lal v. Bansidhar*, 24 A.L.J. 570, 95 I.C. 998, A.I.R. 1926 All. 653; *Bhiku*

v. Shujjat Ali, 29 Cal. 25 (30); see also *Ramdas v. Ramnandan*, 9 P.L.T. 148, A.I.R. 1928 Pat. 195, 108 I.C. 95. He must be assumed to have acted in the manner most beneficial to himself and to have kept the mortgage alive to be used as a shield against an intermediate incumbrancer. In other words, payments made to the prior mortgagee are to be regarded as purchases *pro tanto* of the prior mortgage—*Ramsahai v. Kunwar*, 7 Luck. 26, A.I.R. 1932 Oudh 314 (317), 139 I.C. 626.

Where a mortgagor in executing a simple mortgage of the property on which there was a prior usufructuary mortgage, left with the subsequent mortgagee some portion of the consideration money for the discharge of the prior usufructuary mortgage, and it was redeemed subsequently, *held* that the question whether the prior mortgage was kept alive for the benefit of the subsequent mortgagee of the property who discharged it, was a question of intention, and in the absence of clear express evidence the presumption would be that the intention was to keep up the prior mortgage for the benefit of the subsequent mortgagee—*Har Narayan v. Har Prosad*, 12 A.L.J. 470, 23 I.C. 827.

Where a subsequent mortgagee advances money for discharging a prior mortgage on which a *decree* had been passed, he is entitled to priority in respect of that money in a suit by an intermediate mortgagee. It is sufficient for him to show that there was a prior incumbrance which it was for his benefit to keep alive. The fact that the mortgage had taken the form of a decree does not affect the question—*Purnamal Chand v. Venkata Sabbarayulu*, 20 Mad. 486 (487); *Ram Narayan v. Sahadeo*, 1 Pat. 332 (334), A.I.R. 1922 Pat. 181, 3 P.L.T. 261, 67 I.C. 221. Where the prior mortgagee obtained a decree and the mortgaged property was brought to sale, and thereupon the mortgagor executed a fresh mortgage, the consideration of which was the discharge of the decree, *held* that the prior mortgage was not extinguished, and that the later mortgagee on discharge of the decree could hold the earlier mortgage as a shield—*Ram Bilas v. Lachmi*, 8 O.W.N. 541, 132 I.C. 542, A.I.R. 1931 Oudh 295 (296).

If a third mortgagee pays off a first mortgage, he does not thereby extinguish the first mortgage, but it is kept alive for the benefit of the third mortgagee, who gets priority over a second mortgagee—*Seetharama v. Venkatakrishna*, 16 Mad. 94 (96); *Gangadhara v. Sivarama*, 8 Mad. 246 (249). Where a person mortgaged his property first to A, then to another, and thirdly to A again, in which last mortgage there was a recital of the first mortgage, and a statement as to the liquidation of the first debt, *held*, that the fact of the old debt being paid off by the new transaction would not necessarily destroy the security; and if there was nothing to show a contrary intention, the creditor must be presumed to have intended to keep the security alive for his own protection—*Gopal Chunder v. Herumbo Chunder*, 16 Cal. 523; *Inderdewan v. Gobind Lal*, 23 Cal. 790. Where a mortgagor executed three successive mortgages in favour of B, C and D, and in the third mortgage-deed (executed in favour of D) the fact of the mortgage to C was not disclosed but only the mortgage to B, and it was recited in the deed that out of the money borrowed from D the mortgage in favour of B was to be paid off at once and that there was no other incumbrance affecting the property other than in favour of B; *held* that when the mortgage in favour of D was executed the intention of the parties was that D should have the first

and only charge on the property, and so it was utterly immaterial to consider whether D's intention was to keep alive B's mortgage. D would therefore be entitled to priority over C—*Durga v. Baijnath*, 8 Pat. 360, 10 P.L.T. 479, 118 I.C. 730, A.I.R. 1929 Pat. 325 (327). A property, on which there were two mortgages, was attached subject to those mortgages. The mortgagor then made a third mortgage and by means of the sum raised thereby he paid off the two prior mortgages. The purchaser at auction sale, which followed the attachment, contended that he had purchased the property free from the two prior mortgages and that the third mortgagee was not entitled to any priority over the first two mortgages. It was held that the two prior mortgages were kept alive for the benefit of the third mortgagee. He had advanced the money to pay off the first two mortgages with the idea of keeping the benefit to himself and not to benefit the auction-purchaser—*Dinabandhu v. Jogmaya*, 29 Cal. 154 (P.C.); *Madho Singh v. Panchanan Singh*, 49 All. 233, 25 A.L.J. 45, 101 I.C. 409, A.I.R. 1927 All. 211 (212). A land was subject to three simple mortgages, of which the second was on the crops as well as on the land. A purchaser of the land subject to the three mortgages, and the respondents, who were assignees of his interest, paid money to the second mortgagee to save the crops from sale under a decree which he had obtained under the mortgage. *Held* that there being no covenant by the mortgagor to pay the third mortgage, the payments made to the second mortgagee were to be regarded as purchases *pro tanto* of the second mortgage, not as a discharge of it, the fact that the third mortgage did not include the crops not being material; and that accordingly the respondents were entitled to keep the second incumbrance alive for their own benefit, and thus obtain priority over the third mortgagee—*Ayyareddi v. Gopalakrishna*, 47 Mad. 190 (195) (P.C.), 46 M.L.J. 164, A.I.R. 1924 P.C. 36, 79 I.C. 592.

Where an intermediate mortgagee discharged a mortgage decree passed on a prior and a puisne mortgage, and the decree itself had been passed in a suit to which the intermediate mortgagee was a party but on a compromise arrived at between the other parties to the suit, *held* that the intermediate mortgagee must be deemed to have paid the decree amount not intending to extinguish the mortgage-debts but to keep them alive and to enable him to recover them from the mortgagor—*Nagayyar v. Gobindayyar*, 17 L.W. 14, A.I.R. 1923 Mad. 349 (350), 70 I.C. 286.

Where a mortgagee, subsequently to the execution of the mortgage-deed, takes another mortgage in renewal of the former deed, the prior mortgage is not extinguished but is kept alive, and the mortgagee has priority over incumbrances subsequent to the first deed—*Allangaran v. Lakshmanan*, 20 Mad. 274 (275), following *Sectharama v. Venkata Krishna*, 16 Mad. 94 (96); *Kanhaiya v. Gulab Singh*, 7 Luck. 655, A.I.R. 1933 Oudh 9.

538. Extinguishment:—(Cases under the old section)—Prior to the amendment of this section, as well as prior to the enactment of the T. P. Act, the principle which guided the Court was that where the absolute owner of an estate became also the owner of a charge thereon, in the absence of any intention, express or presumed, merger or extinguishment of title would take place—*Someshwari v. Maheshwari*, 10 Pat. 630, A.I.R. 1931 Pat. 426 (432), 135 I.C. 85. If the mortgaged property is sold to the mortgagee, and there is *no mesne incumbrance* at

the time of the sale, the conclusion seems to be inevitable that the mortgage has been extinguished. The ordinary presumption in such a case is that the owner does not intend to keep up a charge upon the estate to which he has acquired a full title—*Bai Rewa v. Vali Mahomed*, 46 Bom. 1009 (1014), A.I.R. 1922 Bom. 211, 70 I.C. 912. If there is a mesne mortgagee, then it is conceivable that the prior mortgagee who acquires full proprietary rights may keep alive his prior mortgage and use it as a shield when occasion arises. But where there is *no mesne mortgagee*, and the transaction is a straight dealing between the mortgagee on the one side and the mortgagor on the other, whereby the mortgagee obtained the sale of the equity of redemption from the mortgagor and thus acquired full proprietary ownership, the result of the transaction being the confluence of the interests of the mortgagor and the purchaser of the equity of redemption, the doctrine of merger fully comes into operation, and there is no room for any presumption in favour of an intention to keep the prior mortgage alive—*Lakhmi v. Partap*, 12 Lah.L.J. 56, A.I.R. 1930 Lah. 620 (623). See also *Mahesh v. Mohant Bawan*, 9 Cal. 961 (P.C.); *Gobind v. Kuldip*, A.I.R. 1924 Lah. 377, 73 I.C. 764; *Kanhaiya v. Ikram*, 8 Luck. 103, A.I.R. 1932 Oudh 268. "When the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he was seised in fee simple. But if there is an outstanding intervening title, the foundation for the merger does not exist"—*per* Bellows C.J. in *Stantons v. Thompson*, 49 N.H. 272.

A, a mortgagee, brought a suit on his mortgage and obtained a decree for sale of the mortgaged lands. In execution of the decree the property was sold and purchased by the mortgagee himself on the 19th March. Subsequent to this date, the revenue in respect of the lands fell into arrear, and the lands were accordingly notified for sale by the Collector and purchased by B. Held that the result of the first purchase of the land by A was to vest the ownership in him from the date of sale, that he became full owner of the land by his auction purchase, that his mortgage-incumbrance was extinguished and could not be kept alive as a shield against the rights of B; that since A became full owner by his purchase, he was liable for the revenue which fell into arrears *after* his purchase, and that B by virtue of his purchase at the revenue sale was entitled to the lands as against the mortgagee-purchaser A—*Bhawani v. Mathura Prasad*, 40 Cal. 89 (P.C.), 16 I.C. 210. The case would have been otherwise if the revenue had fallen into arrears *before* the property was purchased by A. And so it has been held in an Allahabad case that in considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance should be deemed to be for the benefit of the person who has acquired the property, the point to be considered is the *date of acquisition* of the property. Thus, the plaintiff who held a mortgage over certain property purchased it by means of two sale-deeds. Subsequently a suit for pre-emption was brought in respect of it, and the plaintiff thereupon claimed the amount due upon his mortgage. Held that the mortgage became merged in the sale and had not been kept alive for his benefit. His intention at the time of purchase was to extinguish the charge, and it cannot be treated as still subsisting simply because he afterwards finds that it would have been better for him

to have kept the charge alive—*Jugal Kishore v. Ram Narain*, 34 All. 268, 13 I.C. 619.

Where a purchaser of property subject to various incumbrances undertakes to discharge and extinguish all the incumbrances out of the sale consideration, the presumption is that he intends to discharge and extinguish all the incumbrances over the property and not to keep the prior mortgages alive to be set up as a shield against the claims of a puisne incumbrancer. But the case is otherwise when a purchaser does not undertake to discharge all the incumbrances on the property purchased by him. In such a case he can keep the prior mortgage alive to be used as a shield against the claims of a subsequent incumbrancer—*Maksud Ali v. Shaikh Abdullah*, 50 All. 218, 25 A.L.J. 1017, A.I.R. 1928 All. 77 (79), 108 I.C. 728. A person purchased property subject to two mortgages, and covenanted with the vendor that he would pay off both mortgages. He paid off the first mortgage but not the second. In a suit by the second mortgagee he pleaded the first mortgage he had paid off as a shield against the plaintiff. *Held* that he could not do so; as the first mortgage had been paid off in pursuance of a covenant to discharge it, it could not be treated as alive for any purpose or used as a shield—*Govindasami v. Dorasami*, 34 Mad. 119. The prior mortgagee of the property in suit purchased the property and as a part of the consideration agreed to redeem the subsequent mortgage, which he did not. In a suit by the subsequent mortgagee, *held* that the prior mortgagee was not entitled to set up his own priority as a shield, as the effect of the covenant was to extinguish his own charge—*Thiruvadi v. Janaki*, 45 M.L.J. 693, A.I.R. 1924 Mad. 103 (106), 75 I.C. 1016; *Balbhaddar v. Sheo Mangal*, 1932 A.L.J. 413, 136 I.C. 824.

The rule as to extinguishment of mortgage applies also to purchasers and representatives of the mortgagee. Thus, where a prior mortgagee by conditional sale, having foreclosed his mortgage, transferred the right, title and interest thus acquired to a third person, and a subsequent mortgagee of the same property brought a suit for sale on his own mortgage impleading the purchaser, *held* that the prior mortgagee, when he foreclosed his mortgage, acquired all the rights of the original mortgagor and became the full owner of the property, and any transfer made by him subsequent to the foreclosure-proceedings conveyed to the transferee not the mortgage-interest but the proprietary interest, and the transferee is not now entitled to keep alive the mortgage as a shield in a suit by the puisne mortgagee who had not been made a party in the foreclosure suit—*Munna Lal v. Munan Lal*, 36 All. 327, 23 I.C. 559. A certain property was mortgaged twice to G. G brought a suit on his first mortgage, obtained a decree and purchased the property with the Court's permission, subject to his second mortgage. Subsequent to his death, at a partition between the members of G's family, the second mortgage fell to the share of the plaintiff and the sale-certificate fell to the defendant's share. *Held* in a suit to enforce the second mortgage that as after the purchase G himself could have had no right to sue himself in a double capacity as mortgagor and as mortgagee under the certificate, his representatives claiming under him have no cause of action against each other upon the same materials—*Laxman v. Mathurabai*, 38 Bom. 369, 23 I.C. 121.

539. Subsequent mortgagee suing for sale is bound to redeem prior mortgage:—See the last sentence of this section: "and no

such.....subject thereto." A prior mortgagee who has purchased the property mortgaged to him has a right to be repaid the money due in respect of his mortgage before a subsequent mortgagee can bring such property to sale in execution of a decree on the mortgage held by the latter—*Baldeo v. Uman Shankar*, 32 All. 1 (3).

Notice and Tender.

102. Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person, or otherwise duly authorized to accept such service or tender, shall be deemed sufficient.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be

102. Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person, or otherwise duly authorized to accept such service or tender, shall be deemed sufficient.

Where no person or agent on whom such notice should be served can be found or is known to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient:

Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.

Where no person or agent to whom such tender should be

made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

made can be found or is known to the person desiring to make the tender, the latter person may deposit in *any Court in which a suit might be brought for redemption of the mortgaged property* the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

Amendment:—This section has been amended by section 52 of the T. P. Amendment Act (XX of 1929).

“Section 102, which relates to the service of notice on or tender to an agent of a mortgagee allows the mortgagor to apply to the Court for direction if the mortgagee or his agent cannot be found *in the district* in which the mortgaged property is situate. Even if the mortgagor knows the mortgagee or his agent's whereabouts outside the district, the section allows him to apply to the Court. The third paragraph also contains a similar provision as regards tender. We think that unless the whereabouts of the mortgagee or his agent are *entirely unknown* to the mortgagor or unless the mortgagee or his agent cannot be found *anywhere*, the mortgagor should not be entitled to apply to the Court for direction. We propose to omit the words ‘in the district’ in paragraphs 2 and 3 of the section. In paragraph 2, we propose to make it clear that the application for the service of notice shall be made to the Court in which the deposit has been made and not to any other Court. In paragraph 3 we propose to make it clear that the deposit is to be made in the Court in which a suit for redemption could be filed.”—*Report of the Special Committee.*

103. Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served *on or by*, or tender or deposit made, accepted, or taken by, the legal curator of the property of such person; but, where there is no such curator, and it is requisite or desirable, in the interests of such person, that a notice should be served, or a tender or deposit made, under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of *Order XXXII in the first*

Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to such application, and to the parties thereto, and to the guardian appointed thereunder.

Amendment:—By section 53 of the T. P. Amendment Act (XX of 1929), the words “*on or by*” have been added to correct a mere clerical error (*Report of the Special Committee*), and the reference to Chapter XXXI of the old C. P. Code of 1882 has been replaced by a reference to O. XXXII of the present Code.

540. Minor mortgagee:—Where the mortgagee is a minor, the mortgagor may make a tender to the lawful guardian; if he makes a deposit, the notice of the deposit must be served on the lawful guardian. If there is no lawful guardian, and the mortgagor makes a deposit under sec. 83, it is his duty to make an application for the appointment of a guardian *ad litem* of the mortgagee under this section, and to see that a proper person is appointed guardian, for the purpose of receiving service of notice under sec. 83. Until the mortgagor has done this, he cannot be said to have “done all that has to be done to enable the mortgagee to take the amount out of Court”, so as to exempt the mortgagor from the payment of interest under sec. 84—*Pandurang v. Mahadaji*, 27 Bom. 23 (29); *Sheo Saran v. Ram Lagan*, 44 All. 64 (67); *Shivanath v. Manohar*, 16 O.C. 261, 22 I.C. 245; *Gokul v. Chandra Sekhar*, 48 All. 611, A.I.R. 1926 All. 665, 96 I.C. 1, 24 A.L.J. 769; *Appa Pai v. Somu*, 49 M.L.J. 327, A.I.R. 1925 Mad. 1017, 90 I.C. 754. Where the mortgagor deposited in Court the correct amount but took no steps to have a guardian *ad litem* appointed by the Court for the minor mortgagee, but merely asked for service of notice on the mortgagee ‘under the guardianship of his father,’ *held* that the proceedings were not valid and interest would not cease to run—*Sheo Saran v. Ram Lagan*, 44 All. 64 (65), 19 A.L.J. 852, 64 I.C. 413, A.I.R. 1922 All. 355. Where the mortgagor applied for the appointment of the minor mortgagees’ mothers as their guardians, and notices were issued to the mothers but were not served on them, and the Court eventually ordered service by proclamation but no formal order was recorded appointing the mothers as guardians, *held* that such substituted service was not sufficient. It is necessary for a proper guardian to be appointed that the notice should be served, not by substituted service, but by ordinary service on a person who is capable of becoming a guardian and who agrees expressly or by implication to become a guardian—*Phool Kuer v. Rewari*, 1930 A.L.J. 1020, A.I.R. 1930 All. 609 (610), 124 I.C. 191. See also Note 511 under sec. 84.

No guardian need be appointed under this section when there is already a guardian of the property of the minor mortgagee; but the fact that a certain person had appeared as next friend of the minor in a previous litigation between the same parties, does not dispense with the necessity of appointing a guardian under this section, because the proceedings under this section cannot be called a continuation of the previous suit—*Shivnath v. Manohar*, 16 O.C. 261, 22 I.C. 245.

If there is a dispute as to whether the person in whose favour a deposit is made is a minor or not, the Court has to be satisfied of the fact of minority, and this cannot happen unless the Court inquires into the matter—*Ganeshi Lal v. Rohni*, 50 All. 655, 26 A.L.J. 394, A.I.R. 1928 All. 311 (312), 108 I.C. 570.

When a mortgage, though executed in favour of a minor member, is in reality a mortgage taken by the head of the joint family of which the minor is a member, the mortgage-money being supplied from the joint family funds, it may well be held that an offer to pay the money on such a mortgage to the managing member of the family is a good and valid tender in the eye of the law, and no guardian *ad litem* is necessary to be appointed for receiving the tender—*Sneo Saran v. Ram Lagan*, 44 All. 64 (66), 64 I.C. 413, A.I.R. 1922 All. 355.

The procedure of this section must be strictly fulfilled. Every precaution must be taken to safeguard the interests of the minor, and on this principle, the minor should always have the benefit of any doubt that may exist, where it is a question whether the procedure in a case has been of a nature to bind him or not—*Shivnath v. Manohar*, *supra*.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

Power to make rules.

541. Power to make rules:—The section is an *enabling one*; it merely empowers the High Court to make rules for carrying out the provisions of this Act, but it does not make compulsory on the High Court to do so—*Mallikarjunadu v. Lingamurti*, 25 Mad. 244 (F.B.), 12 M.L.J. 279. In the absence of rules framed under this section, the procedure applicable to suits for the enforcement or realisation of mortgages prescribed by the Code of Civil Procedure will apply—*Dakhina Mohan v. Basumati*, 4 C.W.N. 474; *Raja Ram Singhji v. Chunni Lal*, 19 All. 205 (208).

Before the procedural section of this Act (*i.e.*, secs. 85—90 etc.) were relegated to the Civil Procedure Code, it was held in a Madras case that this section was wide enough to enable the High Court to make rules for the execution of decrees—*Malikarjunadu v. Lingamurti*, 25 Mad. 244 (F.B.). But this decision is no longer of any practical value: for the procedural sections being now incorporated into the new C. P. Code, the rules for the execution of decrees would now be framed under the powers conferred on the High Court by sec. 122 of the Code, and not under this Act.

In the same Madras case, it has been held that this section must be read subject to sec. 15 of the Charter Act (24 and 25 Vict. c. 104) which provides that the High Court shall have power to make and issue general rules for regulating the practice and proceedings of all Courts subject to its *appellate* jurisdiction—*Ibid*. That is, the rules framed under this section would not be binding upon the High Court in the exercise of its *original* jurisdiction in suits on mortgages. And so it has also been held in a Calcutta case that the practice and procedure on the Original Side of the High Court in suits on mortgages differ altogether from the practice and procedure in force in the Courts outside Calcutta. The practice on the Original Side of the High Court is based partly on the rules of the old Courts of Equity in England, partly on the present practice in the Courts in England and partly on its own rules, and is not governed by

the provisions of the Transfer of Property Act. In the Courts outside Calcutta, the practice and procedure has been, and must be, governed by this Act—*Mackintosh v. Watkins*, 1 C.L.J. 31.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered, periodically or on specified occasions, to the transferor by the transferee who accepts the transfer on such terms.

"Lease" defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service, or other thing to be so rendered is called the rent.

"Lessor," "lessee" "premium," and "rent" defined.

541A. This Act codifies for the first time the law relating to landlord and tenant. Prior to the passing of this Act, the Hindu law was held to be strictly applicable to a tenancy created by express contract between Hindus—see *Russick Lall v. Lokenath*, 5 Cal. 688; and the English rules regarding the relation of landlord and tenant were applied whenever no precise rule regarding the subject was to be found in Hindu law or other laws—*Tara Chand v. Ram Gobind*, 4 Cal. 778.

Even in case of a tenancy created after the passing of the Transfer of Property Act, if it does not come strictly within this Act, the rule of English law may be applied—*Kishori Mohun v. Nund Kumar*, 24 Cal. 720 (723).

542. Essentials of a lease:—The following things must concur in the making of every good lease:—

- (i) There must be a lessor, who is able to make the lease.
- (ii) There must be a lessee, who is capable of taking the thing demised.
- (iii) There must be a thing demised which is demisable.
- (iv) If the thing demised or the thing expressed to be granted be not grantable without a deed, the lease must be made by a deed, containing a sufficient description of the lessor, the lessee, the thing demised, the term granted, and the rent and covenants; and all necessary circumstances, as sealing, delivery, etc., must be observed.

(v) If it be a lease for years, it must have a certain commencement, at least when it takes effect in interest or possession, and a certain determination either by an express enumeration of years or by reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent event, which must happen before the death of the lessor or lessee, unless, it should be added, the lease is a permanent one.

(vi) There must be acceptance of the thing demised and of the estate by the lessee—Woodfall's *Landlord and Tenant*, 16th Ed., pp. 134, 135.

The provisions about the amount of rent, the time of payment thereof and the consequences of default relate to the essential elements of a lease—*Lalit Mohan v. Gopalichuck Coal Co.*, 39 Cal. 284 (297) (F.B.), 12 I.C. 723.

Moreover, it is essential for a lease that the exclusive possession of the property leased should be intended to be vested in the transferee. A right of access to a land for the enjoyment of specific interest therein (e.g., cutting and removing trees) attended by a simultaneous right of possession by some other person does not amount to a lease—*Sceni Chettiar v. Santanathan Chettiar*, 20 Mad. 58 (F.B.).

Another essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not, in the nature of things and by reason of the user, disappear. A coal mining settlement does not partake of this character, but still as some portion, however small, of the surface has to be used for carrying on the mining operations and taking the coal out, to that extent it may be regarded as satisfying the requirements of this section and treated as a lease—*Fala Krista v. Jagannath*, 59 Cal. 1314, 36 C.W.N. 709 (719, 720), 140 I.C. 788, A.I.R. 1932 Cal. 775.

543. Agreement of lease:—An instrument by which the conditions of a contract of letting are finally ascertained and which is intended to vest the right of exclusive possession in the lessee either at once (if the term is to commence immediately) or at a future date (if the term is to commence subsequently) is a lease; it is said to operate by way of actual demise, and when the lessee has entered under it, the relation of landlord and tenant is fully created. On the other hand, an instrument which only binds the parties, the one to create and the other to accept a lease *hereafter*, is an *agreement* for a lease, and although the intending lessee enters, the legal relation of landlord and tenant is not created, unless he also pays rent, in which case he becomes a tenant—*Richardson v. Gifford*, (1834) 1 A. & E. 52. Where there is no present demise, the agreement to lease does not operate as a lease, and does not affect the land. It will affect the land only when specifically enforced in a suit properly framed for the purpose, or when followed by the grant of a lease—*Rani Hemanta Kumari v. Midnapore Zemindari Co.*, 22 C.L.J. 44 (49), 19 C.W.N. 347, 28 I.C. 879. A mere offer or agreement to grant or take a lease does not amount to a lease. Thus, a mere offer by the lessor to grant a new lease after the expiration of the current lease, without stating the terms on which the new lease will be granted, will not operate as a lease—*Macnaghten v. Rameshwar*, 30 Cal. 831. So also, where a document ran in the following terms: "I take the shop on a rent of Rs. 50 per annum. I shall pay the rent month after month. On non-payment of rent a right to eject the tenant shall at once accrue to the owner of the shop." It was held that the document was nothing more than an unilateral statement drawn up by the intended lessee in which he set out his intention as to various matters. The document was not addressed to any one; it was not accepted by any one, and no one but the executant was a party to it. It was therefore not a lease, nor even a counterpart of a lease for as there was no lease in existence, there could be no counterpart. It was not even an agreement to pay rent, because an agreement implies a consent of two parties—*Beni*

v. Puran Das, 27 All. 190 (191). Where a patta is tendered to but is not accepted by a tenant, it is not a lease—*Bangat Singh v. Bolama*, 8 M.L.T. 371, 7 I.C. 750.

544. Lease and License distinguished:—The cardinal distinction between a lease and a license is that in a lease there is a *transfer of interest* in land, whereas in the case of a license there is no transfer of interest, although the licensee acquires a right to occupy the land—*Secretary of State v. Karunakant*, 35 Cal. 82 (92) (F.B.); see also *Board of Revenue v. Agent, S. I. Ry. Co.*, 48 Mad. 368 (F.B.), 86 I.C. 688, A.I.R. 1925 Mad. 434, where the distinction is pointed out in detail. See also *In re Burma Shell*, 1933 A.L.J. 749 (F.B.), A.I.R. 1933 All. 735.

Where the agreement of tenancy in respect of certain rooms in a house did not say anything about the use of the privies, but the tenants were informed, when agreeing to become tenants, that their tenancy agreement carried with them the right to use the privies on the floor in common with other tenants, *held* that as regards the privies there was no lease but merely a grant of license, for the definition of a lease in this section did not apply to such a restricted use—*Lakhmichand v. Ratanbai*, 51 Bom. 274, 29 Bom.L.R. 78, A.I.R. 1927 Bom. 115 (122). A document which purports to grant a right to cut and remove trees of a certain description for a certain period, and which expressly provides that the grantee has *no right* to the land, is not a lease, but a mere license to cut trees—*Mammi Kutti v. Pashakkal*, 29 Mad. 353; see also *Seeni v. Santanathan*, 20 Mad. 58 (F.B.). Where the plaintiff permitted the defendant to occupy his house-site so long as the latter did blacksmith's work for the plaintiff, *held* that there was no lease but a mere license—*Athakutti v. Govinda*, 16 Mad. 97.

An agreement was made by which a certain quantity of grain was agreed to be paid to the owner of a strip of land every year on account of the damage to be sustained by him by his allowing the other party (defendants) to take their cattle or carts over the strip of land, and this agreement created a right in the defendants which could be exercised by their transferees or their servants or agents and could not be revoked by the grantor. *Held* that this agreement was a lease and not a mere license or easement—*Indal v. Debi*, 92 I.C. 683, A.I.R. 1926 Nag. 174.

545. Lease for indefinite period:—The Calcutta High Court is of opinion that if a lease is made for an *indefinite* period, the Court should apply the general rule of construction that such a grant enures generally for *the lifetime of the grantee*, unless there are some words showing the intention that a heritable grant is made—*Ashutosh v. Chandi Charan*, 31 C.W.N. 46, A.I.R. 1927 Cal. 179, 99 I.C. 200; *Jogesh Chandra v. Makbul Ali*, 47 Cal. 979, 25 C.W.N. 857, 60 I.C. 984; *Jagadisa v. Bisweswari*, 41 I.C. 227 (230) (Cal.); *Higgins v. Nobin Chander*, 11 C.W.N. 809. But this rule of construction does not apply if the term for which the grant is made can be definitely ascertained. Thus, the word "taluk" or "etman" used in the deed of grant imports a permanent tenancy—*Jogesh v. Makbul*, *supra*. The Bombay High Court, however, is of opinion that in order that there may be a valid lease, it is necessary that there should be fixed a *definite* period during which the lease is to continue, or that there should be words indicating that the lease is to continue in perpetuity. A disposition of land which purports to be a transfer of the right to enjoy the property neither for a certain time nor in perpetuity is an attempt to create

by lease an interest not known to law and as such is bad—*Municipal Corporation of Bombay v. Secretary of State*, 29 Bom. 580.

Where the lease is totally silent as to duration, the presumption of sec. 106 will apply.

The duration of time may be express or implied. A lease between the mortgagor and the mortgagee to last during the pendency of the mortgage is not bad, as the lease is not for an indefinite period but is dependent upon a contingency—*Mohammed Cassum v. Ezekial*, 7 Bom. L.R. 772; *Ramchandra v. Narasinha*, 33 Bom.L.R. 590, A.I.R. 1931 Bom. 466, 133 I.C. 839.

546. Lease in perpetuity:—The words '*istimrari mourasi mokarari*' in a lease create a permanent and heritable estate and not merely for the lifetime of the grantee, even though no other words indicating a heritable interest (such as, the grantee, his sons and grandsons in succession should enjoy the property in perpetuity) are used in the document—*Baikanta v. Lakshan*, 41 I.C. 875 (876) (Cal.); *Monmohini v. Kalidas*, 2 C.W.N. 292. The word 'taluk' used in a lease implies a permanent tenancy; so also, the word 'etman' (used in Chittagong) imports a permanent, heritable and transferable tenure—*Jogesh v. Makbul*, 47 Cal. 979, 25 C.W.N. 857, 60 I.C. 984. But a lease described as *istimrari* only is good only for the lifetime of the lessee, and cannot create an estate of inheritance in the lessee, in the absence of specific clauses referring to succession and transfer—*Hardutt v. Jaikaran*, 56 I.C. 656; *Gaya v. Ramjiwan*, 8 All. 569. So also, the term *istimrari mokurari* in a lease does not primarily imply a heritable character in the grant as the term *maurasi* does—*Narasingh v. Ram Narain*, 30 Cal. 883 (892); *Tulshi Pershad v. Narain*, 12 Cal. 117 (130) (P.C.); *Agin Bindh v. Mohan Bikram*, 30 Cal. 20 (31); *Beni Pershad v. Dudh Nath*, 27 Cal. 156 (165) (P.C.). The words '*istimrari mokarari*' do not *per se* convey an estate of inheritance, but an *istimrari mokarari patta*, notwithstanding the absence of words indicative of heritability (as *ba farzandan*, *naslan bad naslan*, or *al-aulad*) may be a perpetual grant, if the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties show such an intention with sufficient certainty—*Ram Narain v. Chota Nagpur Banking Association*, 43 Cal. 332, 36 I.C. 321; *Tulshi Pershad v. Ram Narain*, 12 Cal. 167 (P.C.); *Narsingh v. Ram Narain*, 30 Cal. 883 (893). A *bayam saswatham patta* is a lease of a permanent character—*Rama Iyenger v. Anga Guruswami*, 35 M.L.J. 129, 46 I.C. 62. A *mirasidar* is a permanent tenant—*Ramchandra v. Sidu*, 1888 P.J. 304. The term 'mulgeni' when used in a tenure denotes its permanent character—*Nagapaya v. Anantaya*, 1891 P.J. 248; *Unhamma v. Vaikunta*, 17 Mad. 218. The *Mukaddami* tenure in the United Provinces does not create any permanent or heritable interest in the lessee—*Bhagwati v. Hanuman*, 23 All. 67. The words 'patni tenure' imply a tenancy of a permanent and heritable character—*Tarini v. Watson*, 3 B.L.R. (A.C.) 437; *Modhu Sudan v. Rooke*, 25 Cal. 13. A lease for five years stated that at the expiration of the term the lessee was to take a fresh settlement under a fresh *kabuliat*, and it further stipulated that the lessee was not to make a gift, sale or mortgage of the tenure to anybody. *Held* that as there were no words of inheritance in the lease, the tenure could not be presumed to be heritable or permanent, and that the tenancy at the end of the five years was for an indefinite period and not in perpetuity—*Jagadisa v. Bisweswari*, 41 I.C. 227 (230) (Cal.). A lease of five years

with a condition that after that period the lessee should hold the property as long as he pleased on the same terms, is a lease merely for the life of the lessee—*Higgins v. Nobin*, 11 C.W.N. 809.

A lease for building purposes, in the absence of any definite terms in the grant, should be presumed to be a permanent one. The absence of the words '*maurasi mokarari*' in such a lease does not necessarily indicate that it was not the lessor's intention to grant a permanent lease—*Pramadanath v. Srigobind*, 32 Cal. 648.

Where a permanent *mokarari* lease contained a clause that "on the lessee's failure to pay rent according to the instalments every year, the *mokarari* will be cancelled at the end of the year," held that the clause merely provided for the forfeiture of the *mokarari* tenure, but did not affect the permanency of the tenure—*Meghlal v. Rajkumar*, 34 Cal. 358 (361).

A mere *long and continuous possession* "for a time so long that the memory of man runneth not to the contrary" is by itself insufficient to raise a presumption of permanency—*Narayan v. Dowlata*, 15 Bom. 647; *Nahanchand v. Modi Kekhushru*, 31 Bom. 185. Mere long possession of homestead land is not sufficient to justify the presumption of a permanent grant, and before such a presumption can be made, there must be something more, *viz.*, that either the land was let for the erection of *pucca* buildings, or that the landlord stood by while the tenant erected permanent buildings or effected substantial improvements on the land—*Nabu v. Cholim*, 25 Cal. 896 (908). A distinction should be drawn between cases in which the origin of the tenancy *cannot be traced*, and cases in which the origin of the tenancy *is known*. When the origin of the tenancy and the circumstances attending its creation are not known, evidence of the mode of dealing with the land demised and of the acts and conduct of the parties generally is an evidence to prove the nature of the tenancy—*Ismail Khan v. Jaigun*, 27 Cal. 570 (582). In such a case, the facts of long possession of a land by the tenants and their ancestors at an unaltered rate of rent, and of the landlord having permitted them to build a *pucca* building which has existed for a very considerable time and which has been added to by successive tenants, and of the tenure having been from time to time transferred by succession and purchase wherein the landlord acquiesced are sufficient to warrant the Court in presuming that the tenancy is a permanent one—*Caspersz v. Kedar Nath*, 28 Cal. 738; *Grant v. Robinson*, 11 C.W.N. 242; *Nilratan v. Ismail*, 32 Cal. 51 (P.C.); *Upendra v. Ismail*, 32 Cal. 41 (P.C.); *Nabakumari v. Behari*, 34 Cal. 902 (P.C.); *Debendra v. Pashupati*, 35 C.W.N. 1047 (1051), 136 I.C. 889, A.I.R. 1932 Cal. 198. If, however, the origin of the tenancy is known, any presumption arising from long possession is negatived, and evidence of the acts and conduct of the parties is not admissible to prove the permanency of the tenancy; and if it is found that the tenancies were created by *kabuliyats* or *pattas* which did not contain any words of inheritance, and which limited the tenant's rights to the term of the possession of the landlord who happened to be a *matwalli*, the fact that the tenants held the lands at a fixed rent for a very long period, and that the holdings had been the subject of several transfers is not sufficient to warrant the presumption that the tenancy was, when first created, intended to be permanent—*Ismail Khan v. Jaigun*, 27 Cal. 570 (582, 583).

Bemiadi lease:—A *bemiadi* lease may or may not be permanent

according to the circumstances of the case. In ascertaining the nature of the grant, the Court must construe the lease according to the expressions used in it along with the surrounding circumstances—*Dinanath v. Janaki*, 55 Cal. 435, 110 I.C. 368, A.I.R. 1928 Cal. 392 (394); *Forbes v. Hanuman Bhagat*, 2 Pat. 452, A.I.R. 1924 Pat. 88, 77 I.C. 32. In both these cases, it was held, upon a proper construction of the terms of the *bemiadi* lease, that it was a permanent grant. But in another case, where the grant of *bemiadi* lease included the minerals and was hereditary, it was held, upon a construction of the lease, that it was only a lease from year to year, and not a permanent one—*Parshan v. Tulsi*, 2 P.L.J. 180, 39 I.C. 658.

547. Immoveable property:—See Notes 17-18 under sec. 3.

A right to collect dues from a weekly market is a right in immoveable property—*Sikandar v. Bahadur*, 27 All. 462. A lease of a *hat* (market) is a lease of immoveable property—*Surendra v. Bhai Lal*, 22 Cal. 752. The right to collect lac from trees is immoveable property—*Parmanandy v. Birkhu*, 5 N.L.R. 21, 1 I.C. 903.

But a right merely to cut and remove trees but not to enjoy the produce of the trees, is not an interest in immoveable property—*Mathura v. Jadubir*, 28 All. 277 (278). A lease of a right to take juice and fruits from palmyra trees and to cut such leaves which are necessary to be cut in drawing juice, is not a lease of immoveable property and does not require registration—*Natesa v. Thangavelu*, 38 Mad. 883 (885). A *yajman vritti*, which denotes an obligation imposed upon the priest to perform certain religious rites, and which carries with it certain emoluments, is not immoveable property in the proper sense of the word, although it is treated as such; and the transfer of the duties and obligations attached to the status of a priest cannot be said to be a transfer of a right to enjoy immoveable property so as to amount to a lease—*Kodulal v. Beharilal*, 25 S.L.R. 451, A.I.R. 1932 Sind 60, 137 I.C. 136.

The property sought to be leased must be in existence, *i.e.*, must be under the control of the lessor. Where the subject matter of a contract purporting to be a lease was a property not only not in the possession of the transferor, (*viz.*, a property which was mortgaged and was in the possession of the mortgagee) but also was one to which the transferor might never establish a title to redeem, and the document of lease provided that a suit was to be brought to redeem the property, and upon possession being recovered the rent agreed upon in the contract should become payable, *held* that having regard to the terms of the lease it was not operative in affecting a present transfer of the property leased, but was only a contract of lease to be performed in future—*Mohendra Nath v. Kali Proshad*, 30 Cal. 265.

548. Consideration of lease:—One of the essentials of a lease is that there should be a consideration to be rendered periodically or on specified occasions to the lessor. Plaintiff and defendants purchased certain shares in a certain village and entered into an agreement by which one of the defendants was to realise his share of profits from certain tenants, and the plaintiff and the remaining defendants were each to realise the rent from all the other tenants of the village and take all the profits for a period of six years in turn. *Held* that the agreement was not a lease because one of the essentials of a lease, *viz.*, consideration to be rendered periodically or on *specified* occasions to the lessor, was entirely absent in it

The agreement was nothing but an agreement between co-sharers as to the method of distribution of profits. Instead of dividing the profits each year, it was agreed that each party should take the profits for six years in turn—*Sita Ram v. Sarju Prasad*, 25 O.C. 39, A.I.R. 1922 Oudh 201, 68 I.C. 333.

Price paid:—The price paid may be an outstanding debt. A document may amount to a lease though the consideration partly consists of an advance made long before the date of execution of the lease—*Beni Prasad v. Mulchand*, 6 I.C. 817, 6 N.L.R. 65; *Nidha Shah v. Muralidhar*, 25 All. 115 (P.C.).

549. Rent:—A servant who occupies land rent-free by way of remuneration for his service is a tenant, and the service rendered by him is to be deemed as rent—*Bandhu v. Balram*, 15 C.P.L.R. 42. So also, where it was agreed that instead of paying rent, the defendant was to give his service as a family doctor to the plaintiff, it was held that the agreement between the parties amounted to a lease—*Jyotish Chandra v. Ramanath*, 32 Cal. 243, 8 C.W.N. 904.

In the case of a coalmine, the rent is a royalty on the amount of minerals extracted, payable at fixed intervals of time—*Manindra Chandra Nandy v. Secretary of State*, 5 C.L.J. 148 (172).

A certain sum described as collection charges and mentioned in the lease as payable annually in addition to rent and forming part of the consideration for the lease, is not to be regarded as *abwab* but as part of the rent—*Radha Charan v. Golak*, 31 Cal. 834. So also, the stipulation to pay collection charges at 2 annas in the rupee is in reality a part of the consideration of the lease, and so long as it is certain and definite in its nature, it would be enforced—*Muhammad Fayez v. Jamoo*, 8 Cal. 730.

The payment of *muhtarifa* is not necessarily a payment of cess, but is in the nature of rent paid by non-agricultural tenants for occupation of the village Abadi—*Muhammad Abdul Hai v. Nathu*, 27 All. 183.

The amount which a patnidar agrees to pay to the Zemindar on account of Chowkidari tax is considered as rent—*Assanulla v. Tirthabasini*, 22 Cal. 680. But the amount which the tenant agrees to pay to the Government as land revenue on behalf of the Zamindar is not rent—*Sheikh Gulam v. Kashinath*, 25 Bom. 244.

553. Lease with security:—In consideration of the lessee paying to the lessor Rs. 4,000 by way of security without interest, the lessor leased certain lands to the lessee for a term of years, with a provision for return of the deposit of Rs. 4,000 after the expiry of the term. Held that the transaction amounted to a lease and not a mortgage—*Sital Prosad v. Dildar Ali*, 1 P.L.J. 1, 33 I.C. 408.

As regards *Zur-i-pesghi* leases, see Note 344 under sec. 58.

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property, for agricultural or manufacturing purposes, shall be deemed to be a lease from year to year terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month terminable, on the part of either lessor or lessee, by

Duration of certain leases in absence of written contract or local usage.

fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally or to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and *either be sent by post to the party* who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

Amendment:—This section has been amended by sec. 54 of the T. P. Amendment Act (XX of 1929), for the following reason:—

“It has been held both in England and in India that, in the case of notice to quit, service by post is a recognised mode of service [(1906) 2 K.B. 82; I.L.R. 46 Cal. 458]. We, therefore, propose to make an addition to the second paragraph of section 106 that notice under the section may be sent by post to the party who is intended to be bound by it.”—*Report of the Special Committee.* See Note 559 below.

551. Agricultural lease:—Although this section speaks of leases for agricultural purposes, still such leases have been expressly exempted from the provisions of this Act by sec. 117 *infra*. The presumption of this section should not be applied to agricultural tenancies, so as to make such tenancies as running from year to year. The reason is that agricultural tenants in India do not hold lands for a limited time; on the other hand, they hold lands for an unlimited period subject to the performance of the obligations incident to the tenure. Any presumption such as is warranted by this section if made in the case of agricultural tenancies would be incompatible with the ordinary local conditions—*Cheekati v. Ranasooru*, 23 Mad. 318; *Venkata v. Dandamudi*, 20 Mad. 299; *Narayana v. Orr*, 12 M.L.J. 447; *Venkatachala v. Ranganatha*, 24 M.L.J. 571, 20 I.C. 374; *Moore v. Makhan Singh*, 53 I.C. 180 (Pat.); *Veeranna v. Annasami*, 21 M.L.J. 845, 12 I.C. 1; *Mahomed Ayejuddin v. Prodyat Kumar*, 25 C.W.N. 13, 61 I.C. 503.

The requirement of this section as to notice does not apply to an agricultural lease, unless it is required by the special enactment governing the lease. Thus, the Chota Nagpur Tenancy Act does not require that the raiyat seeking to eject an under-raiyat should serve him with notice before the expiry of the agricultural year; and the provisions of this section as to notice will not apply to the case—*Jhagru v. Raghunath*, 10 P.I.T. 625, 119 I.C. 551, A.I.R. 1929 Pat. 630 (633).

For the meaning of the word ‘agricultural’ see notes under section 117.

552. Scope of section:—The provisions of this section relating to notice do not apply to suits instituted before this Act came into operation

—*Amabai v. Bhau*, 20 Bom. 759; or to a tenancy which commenced prior to this Act—*Haridas v. Upendra*, 22 C.L.J. 75, 16 I.C. 937; *Debendra v. Pashupati*, 35 C.W.N. 1047 (1055), 136 I.C. 889.

This section has no application to a notice under sec. 108 (e) avoiding the lease on the ground of destruction of the leasehold property by irresistible force. Such a notice takes effect immediately on service—*Damoda Coal Co. v. Hurmook Marwari*, 19 C.W.N. 1019, 31 I.C. 677.

In case of *utbandi* holdings, the rights to occupy the land does not enure beyond a particular season or a particular year, and the tenancy not being a lease from year to year, this section has no application—*Surendra v. Baidya Nath*, 60 Cal. 681, 37 C.W.N. 335.

The principle of this section has been applied to the Punjab. Thus, where there was a condition in the lease that the landlord would give one month's notice if he wanted to have the premises vacated, *held* that it did not mean that notice could be given at any time but that the rule of this section should be applied and the notice must be one expiring with the end of a month of the tenancy—*Chunilal v. Chunilal*, 79 I.C. 957, A.I.R. 1923 Lah. 659 (distinguishing 56 I.C. 7).

Even though a case does not come strictly within this section, still the principle of this section in regard to the giving of notice may be applied to the case—*Kishori Mohun v. Nund Kumar*, 24 Cal. 720 (723).

Leases granted by a Municipality are subject to the provisions of this Act, and a Municipality can determine a lease only by giving a proper notice under this section—*Aminullah v. Emp.*, 26 A.L.J. 328, A.I.R. 1928 All. 95, 107 I.C. 690.

Contract to the contrary:—The rule in this section is made subject to any 'contract to the contrary.' It is only in cases where there is no contract as to notice, that the provisions of this section would be applicable. But where there is a contract as to giving notice or waiving notice the parties are governed by the terms of the contract, and the law enacted in this section cannot apply—*Moosa Kutty v. Thekke*, A.I.R. 1928 Mad. 687 (689), 110 I.C. 398. Thus, the parties may validly stipulate for *two* months' notice on either side; see *Bholanath v. Durga Prosad*, 12 C.W.N. 724; or for a week's notice—*Shibdayal v. Dhanpat*, A.I.R. 1923 Lah. 281, 75 I.C. 490; or there may be a covenant in a lease for a term of one year that the tenant should vacate the house as soon as the landlord desired him to do so, in which case no notice would be necessary before suing the tenant in ejectment—*Khuda Baksh v. Abid Husain*, 3 I.C. 873, 12 O.C. 279; *Kelu v. Ammad*, 9 M.L.T. 198, 1910 M.W.N. 794, 8 I.C. 362; *Mukat Singh v. Misra Paras Ram*, 79 I.C. 106, A.I.R. 1924 All. 726 (727); *Moosa Kutty v. Thekke*, *supra*; or there may be a contract in a lease that the tenant should vacate within one week or one month or two months of the receipt of notice, whatever be the day of the month, and that the week or month or two months would count from the *date of receipt of notice*; in such a case the notice need not expire with the end of a month of the tenancy—*Rure v. Ghulam*, A.I.R. 1924 Lah. 643, 75 I.C. 1034; *Sh. Kasim v. Haji Yusuf*, A.I.R. 1924 Nag. 220; *Radha Kisen v. Rattan Lal*, 56 I.C. 7; *Ram Nath v. Badri*, A.I.R. 1928 Lah. 348, 106 I.C. 537. So again, where a lease provides that the landlord may at any time resume possession of the land on payment of full compensation to the lessee for the buildings he may have erected thereon, such a provision is a 'contract to the contrary,' and no notice to quit is necessary in order to entitle the landlord

to get back khas possession—*Monindra v. Radha Prasanna*, 47 I.C. 19 (Cal.). But the contract between the parties must be a valid one—*Debendra v. Syama Prosanna*, 11 C.W.N. 1124 (1126).

If there is a contract between the parties, such a contract will be strictly enforced. Thus, where a kabuliyat provided for full two months' notice, a notice less by one day was held to be not a valid one—*Bhola Nath v. Durga Prosad*, 12 C.W.N. 724.

553. Presumption as to duration of lease:—When the tenant holds no written or registered lease and the land is let for other than agricultural or manufacturing purposes, the tenant has only a monthly tenancy of the land terminable by fifteen days' notice, even though the rent appears to have been payable annually—*Debendra v. Syama Prosanna*, 11 C.W.N. 1124; *Sheikh Akloo v. Emanon*, 44 Cal. 403, 33 I.C. 899; *Mangal Singh v. Atra*, 3 Lah.L.J. 222, 60 I.C. 226; *Sarat Chandra v. Jadab Chandra*, 44 Cal. 214. The mere fact that the rent of a holding or dwelling house is payable in one sum yearly is not sufficient to make the tenancy a tenancy from year to year—*Mohendra v. Narendra*, 50 I.C. 918 (Cal.); *Biseswar v. Pitambar*, 51 I.C. 44 (Cal.); *Durgi Nikarini v. Gobardhan*, 19 C.W.N. 525 (530), 24 I.C. 183.

In this country the practice of letting shops and dwelling houses on monthly tenancies is so widespread as to warrant the legislature in raising a presumption in favour of monthly tenancies by this section, unless it is proved by a written contract that the lease was an annual one—*Arunachella v. Ramiah*, 30 Mad. 109 (112); *Sanker Ram v. Tulshi*, 2 P.L.T. 178, 61 I.C. 976. The ordinary inference as to leases of buildings in Calcutta would appear to be that the tenancy is from month to month—*Kally Das v. Monmohini*, 24 Cal. 440; *Nocoordas v. Jewraj*, 12 B.L.R. 263.

A lease of land, which did not specify any period, provided that the tenant should enjoy and possess the land after building a *bashabari* upon it. Held, that as no period was fixed, the lease was a lease from month to month—*Mohim v. Anil Bandhu*, 13 C.W.N. 513, 1 I.C. 66, 9 C.L.J. 362.

554. Notice:—The object of the provision as to notice is to prevent the landlord from turning out the tenant at any moment at his option (which would render the position of the latter wholly insecure) and to enable the tenant to gather up the fruits of his labour. A notice to quit is therefore a necessary prelude to the legal determination of a tenancy, and a suit for ejectment brought without notice is liable to be dismissed—*Rajendranath v. Bassider Ruhman*, 2 Cal. 146; *Sheikh Sonaulla v. Troylukho*, 2 C.W.N. 383.

When not necessary:—No notice is necessary if the lessee is a tenant by sufferance. See notes to sec. 116. under heading "Holding over."

Where the tenant repudiated the title of the landlord and set up the title of a third party, the landlord could bring an ejectment suit without giving any previous notice to quit, since the tenant forfeited his tenancy by denying the landlord's title—*Anandamoyi v. Lakshmi Chandra*, 33 Cal. 339; *Haidri Begum v. Nathu*, 17 All. 45. But under clause (g) of section 111 as now amended, the lessor must give notice of his intention to determine the tenancy.

A licensee may also be ejected without notice—*Athakutti v. Gorinda*, 16 Mad. 97.

A trespasser is not entitled to any notice. Thus, on failure to perform

the service, a service holder becomes a mere trespasser; and no notice to quit is necessary before ejectment—*Wazir Nonian v. Ram Prasad*, 59 I.C. 893 (Pat.).

Where a lease is for a fixed period, it is determined under section 111 (a) by the efflux of time limited by the lease, and notice must be presumed by implication as given when it was executed; therefore no notice under sec. 106 is required for the termination of the lease—*Faziluzzaman v. Anwar*, 1932 A.L.J. 126, A.I.R. 1932 All. 314, 139 I.C. 828; *Gokul Chand v. Shib Charan*, 9 A.L.J. 574, 13 I.C. 59; *Bishen Sarup v. Abdul Samad*, 1931 A.L.J. 666, A.I.R. 1931 All. 649 (650).

Where the tenant had expressly agreed to give up possession on a certain fixed date, he need not be given a formal notice to quit—*Dina Singh v. Jamal Singh*, 78 I.C. 446, A.I.R. 1925 Nag. 48. No notice is necessary where it is waived by the parties by a contract to the contrary; see 12 O.C. 279 and other cases cited under "Contract to the contrary" in Note 552 *supra*.

A sub-lessee is not entitled to a notice before ejectment after the surrender by the original lessee—*Shyam Lal v. Bachchu Lal*, 11 A.L.J. 981, 20 I.C. 11.

Period of notice:—A lease from year to year is terminable with six months' notice. In a tenancy with an annual rent reserved, *i.e.*, in an annual tenancy, the tenant is entitled to six months' notice before he can be ejected—*Kishori Mohun v. Nund Kumar*, 24 Cal. 720 (723); *Ismail v. Jaigun*, 27 Cal. 570 (577). A lease of a homestead land is a lease from month to month terminable by 15 days' notice—*Debendra v. Syama Prosanna*, 11 C.W.N. 1124 (1126).

If the tenancy is one from month to month, and the tenant is entitled to 15 days' notice, a six months' notice requiring him to quit at the end of the year is not invalid. In fact it is more than sufficient—*Debendra v. Syama Prosanna*, 11 C.W.N. 1124 (1126). But where the tenancy is a yearly tenancy, it is terminable only by six months' notice, and any notice which falls short of this period is not sufficient—*Kishori Mohun v. Nund Kumar*, *supra*. A notice which gives less than 15 days' notice to a monthly tenant is invalid, and cannot determine the tenancy—*Farzand Ali v. Motilal*, 2 P.L.T. 282, 62 I.C. 421 (422).

555. What is a valid notice:—Notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law. The test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they refer, but what they would mean to tenants presumably conversant with all those facts and circumstances. The notices are to be construed with a view to their validity and not with a desire to find faults in them which would render them defective. A notice need not be worded with the accuracy of a plea—*Harihar v. Ram Sashi*, 46 Cal. 458 (P.C.), 23 C.W.N. 77.

The notice must designate the date on which the tenant is to vacate. A notice to quit "at the expiration of the current year of your tenancy, which shall expire after the end of one-half year from the service of the notice" (*Doe d. Digby v. Steel*, 3 Camp. 117) or simply a notice to quit "at the expiration of the present year's tenancy" (*Doe d. Gorst v. Timothy*, 2 Car. & K. 351) or a notice "at the expiration of the current year" (*Doe d. Baker v. Wombwell*, 2 Camp. 559) are valid notices. But

a notice to quit generally without referring to some distinct time would be invalid—*Goode v. Howells*, 4 M. & W. 199.

A notice to quit calling upon the tenants of a holding to quit a *portion* of it is absolutely bad and an action for ejectment can be defeated by tenants by proof that the contents of their holding are more than the part named—*Harihar v. Ramsashi*, 46 Cal. 458 (P.C.).

A notice to quit is not bad for slightly wrong statements, *e.g.* where it includes some lands which it is found the defendant does not hold under the plaintiff—*Shama Churn v. Wooma Churn*, 25 Cal. 36.

The giver of a notice is not bound to admit the person to whom it is given as a tenant. A notice is not bad because it is addressed to the tenant not as tenant but as a trespasser—*Ram Charan v. Hari Charan*, 7 C.L.J. 107; *Secy. of State v. Madhu Sudan*, 36 C.W.N. 918 (921).

It was held in an earlier case of the Allahabad High Court that a notice to quit must not be coupled with an alternative demand for *enhanced rent*. A notice containing such expressions as "if you do not quit within a month from this, I will sue you for rent at an enhanced rate" was held to be a conditional one and therefore not a valid notice to quit—*Bradley v. Atkinson*, 7 All. 899 (F.B.). The reason of this decision is thus stated: "In the letter [notice] there was no intention expressed to terminate the tenancy. It is an intention on the part of the lessor that if the rent should not be paid within a month's time from that date, he would bring a suit against the lessee. He merely tells the lessee to vacate the rooms or to pay the penalty. This is not a notice which can terminate the tenancy and therefore the tenancy was not determined"—*Ibid* (*per* Petheram C.J.). But in England, it has been held that a notice otherwise sufficient is not rendered insufficient by its being accompanied with something else; and therefore, where the lessor gave the lessee notice in writing to quit upon a specified day and then went on to say, "and I hereby further give you a notice that should you retain possession of the premises after the day before mentioned, the annual rent of the premises now held by you be £150," it was held that the explicit first portion of the notice was not impaired or rendered nugatory by the alternative given by the second portion of continuing to hold the premises at an increased rent—*Ahearn v. Bellman*, 4 Ex. D. 201. And now the Allahabad High Court has laid down in a later case that a notice to quit with a condition superadded for enhancement of rent on failure to quit in accordance with the notice, is good enough to terminate the tenancy, and is not to be treated as an offer of a new tenancy at a higher rent; and the landlord is entitled to a decree for ejectment. The notice does not amount to an offer to renew the tenancy at an enhanced rate of rent—*Shankar Lal v. Babu Ram*, 43 All. 330 (332) (following *Ahearn v. Bellman*, *supra*). The Patna High Court, however, sticks to the earlier Allahabad view and holds that a notice of ejectment is quite distinct from a notice of enhancement; in the former case the lease is determined by the notice and thereafter the lessee becomes a trespasser. If in the notice an alternative term enhancing the rent from the date mentioned in it is proposed on which the defendant is required to vacate the premises, the continuance of the tenant to hold over implies an acceptance of the term proposed—*Farzand Ali v. Motilal*, 2 B.L.T. 282, 62 I.C. 421 (422).

But where a landlord wrote to his tenant asking him to execute an

agreement to pay increased rent and concluded by saying "otherwise I shall take steps to eject you and hence you consider this 15 days' notice expiring with the end of this month" it was held that this was a good notice to quit—*Ganga Das v. Ananda*, 13 C.W.N. 146, 2 I.C. 548; *Jugla v. Hur Narain*, 19 I.C. 758 (All.) distinguishing 7 All. 899 cited above.

Where the lessor's solicitors gave notice to quit in the following terms:—"We give you notice that our client will require you to vacate and give up possession of the premises on the 29th February next, and that, should you fail to comply with the request, our client will take proceedings against you to eject you from the premises and he will charge you the sum of Rs. 350 per month as *damage* sustained by him during such period as you continue in possession after the 29th proximo," it was held that it was a good clear notice to quit and the addition of the second portion of the notice did not vitiate it—*Strager v. Price*, 12 C.W.N. 1059; *Bhagwan v. Savitri*, 78 I.C. 651, A.I.R. 1925 All. 199 (200).

Where a landlord gives notice to a monthly tenant to vacate the premises by a certain date, or in the alternative to pay enhanced rent from that date, and the notice is invalid for not giving clear 15 days' time, the tenancy is not determined and therefore the landlord cannot sue the tenant either for ejectment or for rent at the enhanced rate on the basis of the notice—*Farzand Ali v. Motilal*, (*supra*).

556. Notice according to Bengali Calendar:—Where the tenancy is regulated and rent paid according to the Bengali year, a notice calculated according to the Bengali calendar is sufficient to terminate the tenancy—*Debendra v. Syama Prosanna*, 11 C.W.N. 1124 (1126); *Haridas v. Upendra*, 22 C.L.J. 75, 16 I.C. 937; *Ismail Khan v. Jaigun*, 27 Cal. 570 (577); *Raj Behari v. Kailash*, 22 C.L.J. 78, 30 I.C. 887; *Gobinda v. Dwarka Nath*, 19 C.W.N. 489 (492), 26 I.C. 962. Thus, if the year of the tenancy commences from 1st Baisakh and ends with the last day of Chait, a six months' notice served on the 31st Aswin (17th October) requiring the tenant to quit at the end of Chait (13th April) is valid, even though if calculated according to the corresponding days of the English calendar the notice falls short of six months by 4 days—*Debendra v. Syama Prosanna*, 11 C.W.N. 1124 (1126). In case of a lease of a shoproom, a notice given on the 16th Baisakh calling upon the tenant to vacate on the 31st Baisakh (the last day of the month) is a valid notice—*Gobinda v. Dwarka*, *supra*.

557. "Expiring with the end of a year or month":—It is not sufficient that the duration of the notice should be six months or 15 days, as the case may be; it is also required that the notice should expire with the end of the year or month. Thus, if the year of a tenancy is computed from the 1st Baisak to the end of Chaitra, a notice given on the 26th Jaistha, calling upon the tenant to quit the land on the last day of Aghran is not valid (even though the duration of the notice is more than 6 months). It ought to have required the tenant to vacate on the end of Chaitra—*Hemangini v. Sri Gobinda*, 29 Cal. 203 (205, 206). So also, in the case of a monthly tenancy, the notice to quit must require the tenant to vacate at the *end* of the month, and *not before*. Thus, if the tenancy is regulated according to the English Calendar, the notice must require the tenant to vacate on the 31st January, or 28th February or 31st March and so on; and a notice asking the tenant to quit *before* the end of the month would be invalid, even though it gives 15 days' time.

So, a notice given on the 1st January requiring the tenant to quit on the 20th January (or even on the 20th February) is invalid though there is an interval of more than 15 days between the date of notice and the date of the required surrender. Thus, a notice was given on the 9th June that the lessee should vacate the premises after lapse of a month from that date; *held* that the notice was inoperative in law as it did not expire at the end of a month although it was of a longer duration than 15 days. Such a notice cannot terminate the tenancy—*Bijay Chandra v. Howrah Amta Ry. Co.*, 38 C.L.J. 177, A.I.R. 1923 Cal. 524, 72 I.C. 98. If the tenancy commences from *any day in the middle* of the calendar month, (e.g. 10th or 12th or 15th), the month of the tenancy must be calculated as ending on the corresponding day of the next month. Thus, if a monthly tenancy is from the 6th of one month to the 5th of the next month, a notice given on the 30th June requiring the tenant to quit at the end of July is bad—*Bengal National Bank v. Janoki*, 54 Cal. 813, 31 C.W.N. 973, A.I.R. 1927 Cal. 725 (730). If the tenancy is created according to the *Indian Calendar*, the notice must be given in accordance with that calendar, calculating the month or year according to that calendar, and not according to the *English* calendar. Thus, a house was let on a monthly tenancy, the month being calculated from the 27th of one month to the 26th of the next month of the *Hindi Calendar*. Notice was served on the 31st December 1915 (11th *Pous*) directing the tenant to vacate on the 31st January 1916 (12th *Magh*). *Held* that the notice was invalid. The notice in order to be valid ought to have directed the tenant to vacate on the 26th day of a month, the day on which every month expired according to the terms of the tenancy—*Sheoti Bibi v. Jagannath*, 18 A.L.J. 854, 57 I.C. 593.

If the tenancy is to commence on a particular date of the Bengali month, the year of the tenancy commences from that date, and any notice served under this section must terminate with the end of the year so calculated. Thus, if a tenancy commences from the 14th *Pous*, the year of the tenancy must be calculated as commencing from 14th *Pous* and ending with the 13th *Pous* of the next year. Consequently a notice to quit must require the tenant to quit on the 13th *Pous*. A notice calling upon the tenant to quit in *Ashar* is bad; see *Kishori Mohun v. Nund Kumar*, 24 Cal. 720 (724). But if it appears that although the tenancy was created from the middle of a Bengali month (e.g. 19th *Chait*), still the *rent has all along been paid according to the ordinary Bengali year* calculated as commencing from 1st *Baisakh* and ending with 30th *Chait*, *held* that the year of the tenancy in this particular case must be calculated according to the ordinary Bengali year, and a six months' notice given on the 23rd *Aswin* requiring the tenant to quit on the *last day of Chait* is a valid notice—*Ismail v. Jaigun*, 27 Cal. 570 (577). It is perfectly open to the parties to agree that the monthly period of tenancy should be reckoned not from the date of lease but from another date, and all that the Court has to do is to ascertain whether such was the intention of the parties. When the tenant's entry takes place in the *middle* of a calendar month and rent is payable from the date of entry, *but the parties agree* that the rent should be payable at the *end* of the calendar month, the reasonable inference is that they intended that the monthly tenancy should coincide with the calendar month. In such cases, the fifteen days' notice to quit must be so given as to expire with the end of the calendar month, and not with reference to the date of the entry or of the lease, unless the

intention of the parties appears to the contrary—*Arunachella v. Ramiah*, 30 Mad. 109 (111, 112).

A lessor served the lessees (yearly tenants) with a notice on the 28th September 1891 in the following terms: "Within two days from the receipt of this notice, meet us, increase the rent and give us a legal writing or in default on the 31st March 1892 I shall take full possession of the said land." *Held* that the lessees were by that notice given two days to make a fresh agreement with the landlord, failing which the notice to them to quit at the end of the year of the tenancy became unconditional and absolute. The notice was therefore a good and valid one to terminate the tenancy—*Kikabhai v. Kalu*, 22 Bom. 241.

If the notice is insufficient (on the ground that it requires the tenant to vacate *before* the end of the year of the tenancy), a suit based upon such notice must fail, and the Court cannot even pass a decree to the effect that the tenant must quit at the end of the year—*Hemangini v. Srigobinda*, 29 Cal. 203 (206), dissenting from *Ram Lal v. Dina Nath*, 23 Cal. 200.

A notice given on the 16th of a month requiring the tenant to vacate "within" the 31st (the last day of the month) is not invalid. The word "within" means "not later than"—*Gobinda v. Dwarka*, 19 C.W.N. 489 (492). Even a notice calling upon the tenant to quit "before" the expiry of the last day of the year is not bad, because it is the same thing as asking the tenant to quit *on* the expiry of the last day—*Ismail Khan v. Jaigun*, 27 Cal. 570 (578). But a notice requiring the tenant to quit on the last day *at noon* is bad, because the tenant is not bound to vacate before midnight—*Page v. More*, (1850) 15 Q.B. 684.

But a notice giving a *longer* time by a few hours is not bad. Thus, if the notice issued on the 15th September asked the tenant to quit on the forenoon of the 1st October, it was held that though the notice ought to have terminated the tenancy on the 30th September, it was not bad by being too long by a few hours—*Gnanaprakasam v. Vaz*, 60 M.L.J. 293, A.I.R. 1931 Mad. 352 (355).

Fifteen days' notice:—The fifteen days' notice referred to in the section means 15 clear days. Thus, where the plaintiff served his notice on the defendants on the 16th Falgoun, and required them to quit the land on the 30th of the same month, so that the defendants had only fourteen clear days, the notice to quit was held to be bad—*Subadini v. Durga Charan*, 28 Cal. 118, 4 C.W.N. 790. In other words, the day on which the notice is given is excluded from calculation. See Sec. 110. But the day on which the notice is to *expire* is not to be excluded. And therefore, a notice served on the 16th Baisakh calling on the tenant to quit on the 31st is a good notice, as it gives 15 clear days' time (the 31st Baisakh not being excluded from calculation)—*Gobinda v. Dwarka*, 19 C.W.N. 489 (493), 26 I.C. 962.

557A. Month or year of tenancy—Effect of Sec. 110:—Sec. 110 says that if the time limited by a lease is expressed as commencing from a particular day, in computing that time such day shall be excluded. So, if a tenancy under an agreement is said to commence from 1st June 1921 and to last for 4 years, the lease will commence (according to the first para of sec. 110) on 2nd June 1921 and to expire (according to second para of sec. 110) on the midnight of 1st June 1925. Thereafter, the tenant holding over will hold from month to month, *i.e.*, from 2nd

June to 1st July, and so on. Therefore, if on the 1st February 1928, the tenant gave notice of his intention to quit on the 1st March, the notice was valid and effective. The notice was operative till the midnight of the 1st March 1928—*Benoy Krishna v. Salciccioni*, 60 Cal. 389 (P.C.), 37 C.W.N. 1, A.I.R. 1932 P.C. 279, 141 I.C. 514. Similarly, if a tenancy is created on the 1st December 1924 for a period of one month, “and thereafter unless and until the tenancy should be determined by a 15 days’ notice expiring within the *calendar* month”, it must be held that the first month of the tenancy commenced on the 2nd December 1924 (according to the provisions of sec. 110), and expired on the 1st January 1925, but thereafter it continued according to the *calendar months*, i.e., January, February and so on. Therefore, if a notice is given on the 15th September requiring the tenant to vacate on the forenoon of the 1st October, the notice is not strictly speaking a correct notice; because it ought to have called upon the tenant to quit on the midnight of the 30th September, that being the time and date of expiry of the *calendar* month; but the Court excused the mistake on the ground that a notice need not be worded with the accuracy of a plea—*Gnanaprakasam v. Vaz*, 60 M.L.J. 293, A.I.R. 1931 Mad. 352 (353). “The validity of a notice to quit ought not to turn on the mere splitting of a straw. If hyper-criticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before.” “The law upon notices to quit is highly technical, and I do not desire to add one more technicality to it”—thus observed Lidley L.J. and Smith L.J. in *Sidebotham v. Holland*, (1895) 1 Q.B. 378, in which the yearly tenancy ran from 19th May of one year to the 18th May of the next year, and the landlord gave a wrong notice requiring the tenant to quit on the 19th, instead of on the 18th May.

558. Who can give notice :—The notice may be given by either the lessor himself or *his agent*. Thus, in the case of a notice given by a landlord, it is sufficient if it is given at the instance of the landlord, and signed by his agent, and it is not necessary that it should be signed by the landlord himself—*Mohendra v. Biswanath*, 29 Cal. 231; *Gobinda v. Dwarka*, 19 C.W.N. 489 (493).

In the case of notices given on behalf of Government in respect of Crown lands, the Collector is competent to sign them and it is not necessary that the Secretary of State should sign—*Rakhal Chandra v. Secretary of State*, 10 C.W.N. 841 (844).

The recognized Secretary of a Corporation is competent to give or receive notice on behalf of the Corporation—*Doe d. Birmingham Canal Co. v. Bold*, 11 Q.B. 127.

A notice to quit certain premises belonging to a temple may be validly signed by the authorised agent of the manager of the temple and need not be signed by the manager himself—*Bhagwan v. Shiv Sabitri*, 78 I.C. 651, A.I.R. 1925 All. 199.

In case of joint landlords one of them cannot give notice without the consent of others. The reason is, that if any one of them is to be at liberty to enhance rent or eject tenants at his own peculiar pleasure, there would be no safety for tenants, and it would be impossible for them to know how to regulate their conduct or whom to regard as their landlord—*Balaji v. Gopal*, 3 Bom. 23; *Karamat Ali v. Hanuman*, 31 I.C. 56 (Cal.).

559. Service of notice :—This section does not require that the notice should be delivered to the tenant personally by the landlord or his agent, or that it should be given direct to the tenant. Anyhow if the notice is delivered by some one to the tenant, the requirements of this section are complied with. If therefore notice is given in the first instance to the solicitor of the tenant, and is then conveyed by him through a relative or servant to the tenant, it is sufficient—*Bhojabhai v. Hayem Samuel*, 22 Bom. 754.

When two tenants hold premises in common, notice to quit to one of them is sufficient to determine the tenancy—*Woodfall's Landlord and Tenant*, 16th Ed., p. 379. Where, therefore, a notice to quit addressed to all the joint tenants who lived in commensality was handed over to one of them who signed an acknowledgment of it, *held* that the service was a good service—*Rojoni Bibi v. Hafzoonissa*, 4 C.W.N. 572; *Doe v. Watkins*, (1806) 7 East 551, 8 R.R. 670. In the case of joint tenants, if there is a tender or deliver of the notice to the head of the family, the service is sufficient. It is not necessary to deliver or tender the notice on each of the tenants personally—*Kedarnath v. Modhusudan*, 37 C.L.J. 478, 75 I.C. 105, A.I.R. 1923 Cal. 682. The procedure in case of joint tenants is that each is intended to be bound, and it has long ago been decided that service of a notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants—*Harihar v. Ramsashi*, 46 Cal. 458 (P.C.). But the notice must be *addressed to all* the tenants. If a notice is addressed to one joint tenant, and served on him, another joint tenant is not bound by such notice—*Bejoy Chand v. Kali Prosanna*, 29 C.W.N. 620, A.I.R. 1925 Cal. 752 (754), 87 I.C. 708.

Under this section, the notice may be served on one of the family or servants of the tenant. If the notice has once been delivered to the addressee's relative or servant, it becomes immaterial whether the addressee actually receives it or not—*Doe de Neville v. Dunbar*, N. & M. 10. "When once you constitute your servant as your agent for that general purpose, service on that agent is service on you: he represents you for that purpose—he is your *alter ego*, and service upon him becomes an effective service upon yourself. Therefore the fact that the agent who received the notice put it into the fire would liberate entirely the person who delivered the notice, but it would not liberate the receiver of the notice when once the agency was established; it would not avail him as a mode of escaping from the consequences of his having employed such an agent"—*per* Lord Hatherley, L.C. in *Tanham v. Nicholson*, 5 App. Cas. 561 (568, 569). But it should be noted that such service on the relative or servant must be made by delivery at *the residence* of the tenant. A service on a man's wife at a place other than his residence is not a sufficient service—*Doe de Blair v. Street*, 2 A. & E. 328.

The publication of notice in a newspaper does not amount to service of notice. Thus, where the landlord gave notice to vacate to the defendant, along with several other tenants, by means of an advertisement in a local newspaper, and it did not appear that the same form of notice was handed to the defendant or any member of his household, or that even a copy of the newspaper was sent to the defendant by hand or by post, it was held that to allow a mere advertisement in a newspaper to take the place of a notice to the tenant (or to the landlord) in terminating the tenancy was against reason and authority and that the persons to be

affected must be addressed in a way which left no reasonable doubt as to his having knowledge of the notice—*Chandmal v. Bachraj*, 7 Bom. 474.

As a last resort, notice may be served by affixing it to a conspicuous part of the leased property. But before such service can be held to be valid, the Court will require strict proof to show that the service by tender or delivery as prescribed by this section was not practicable. A Civil Court peon went to serve a notice upon two tenants, one of whom was a pardanashin lady and the other a minor boy. Being told that the lady was indoors and that the boy had gone out to look after the cattle, the peon beat a drum, read the notice aloud and affixed a copy of the notice on the wall of the house. There were servants present, but no attempt was made to tender the notice to them or to find the boy and tender the notice to him. *Held* that the service of notice was not valid, in as much as the affixing of the notice to the wall was of no avail unless it was made out that tender or delivery was not practicable—*Biseswar v. Pitambar*, 51 I.C. 44 (Cal.).

Notice sent by post:—Service of notice may be made by a registered letter through the post office. Such service is not necessarily bad, provided it is proved that the post-peon delivered the letter either personally to the party or to one of his family or to his servant—*Subadini v. Durga Charan*, 28 Cal. 118; *Harihar v. Ramsashi*, 46 Cal. 458 (P.C.). This is now expressly provided by the amendment made in the second para.

A notice sent by post must be addressed to the place of residence of the tenant. If addressed to the tenant at his *gadi* or place of business, the notice is not duly given—*Gobinda v. Dwarka*, 19 C.W.N. 489 (499).

It may be generally said that a notice is duly served if it is sent by registered letter, *though it is refused* by the tenant, and the bare fact of refusal to take and open the registered cover does not entitle the tenant to plead non-service of notice—*Jogendra v. Dwarka Nath*, 15 Cal. 681. If the letter containing the notice is properly addressed to the residence of the tenant, and is registered at the post office and left in the custody of the postal authorities, it must be presumed under sec. 114, Evidence Act, that the letter reached the tenant in the ordinary course: and the fact that the post office afterwards returned the letter as refused by the addressee does not destroy the presumption—*Girish v. Kishore*, 23 C.W.N. 319 (320), 54 I.C. 5. The tenant refusing the notice cannot afterwards plead ignorance of its contents, for he will be fixed with constructive notice—*Ismail Khan v. Kali Krishna*, 6 C.W.N. 134 (137).

If a notice is sent by post, and is refused by the addressee, certain questions of evidence arise as to the date of sending the notice, the fact of return, and the date of tender or refusal. These are considered below:—

(1) If the notice is sent by post, it is first of all necessary to ascertain the date on which it was posted, and for that purpose it is necessary to rely on the date of the post mark, because the mere fact that a notice is dated 16th of a month does not show that it must have been posted on that date—*Gobinda v. Dwarka*, 19 C.W.N. 489 (495), 26 I.C. 962. For instance, if the notice is dated 16th of a month calling upon the tenant to vacate on the 31st day of the month, but the notice is posted (as evidenced by the post mark) on the 17th, the notice is *prima facie* insufficient.

(2) If the notice sent by registered letter comes back to the sender

through the Dead Letter office, that fact does not justify the presumption that it has been *refused* by the tenant; for it may well be that it has been returned by the Post office because the addressee has not been found; much less is there a presumption that the cover has been tendered to the addressee on a particular date—*Gobinda v. Dwarka*, 19 C.W.N. 489 (498).

(3) The date of the post mark of the post office of destination does not necessarily show that the letter was tendered to the addressee on the same date, especially if it is a registered letter which is delivered by the post office only between specified working hours. Therefore, if a notice sent by registered post on the 16th of a month (calling upon the tenant to vacate on the 31st) reaches the post office of destination on the same day (16th) as evidenced by the post mark of that post office, that does not conclusively prove that the letter was tendered to the addressee on the 16th. And in the absence of such proof, the notice would be insufficient—*Gobinda v. Dwarka*, 19 C.W.N. 489 (495).

(4) If the letter comes back to the sender with an endorsement on the cover to the effect that the letter is returned as the addressee refused to receive it, and the endorsement is signed and dated by the peon, such endorsement is no evidence of the fact that the cover was tendered to the addressee on that date nor of the fact that it was refused by him on that date. These facts must be proved by calling the peon as a witness—*Gobinda v. Dwarka*, 19 C.W.N. 489 (496).

107. A lease of immoveable property from year to year,
Leases how made. or for any term exceeding one year, or
 reserving a yearly rent can be made only
 by a registered instrument.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immoveable property is made by a registered instrument, such instrument, or where there are more instruments than one, each such instrument, shall be executed by both the lessor and the lessee:

Provided that the Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

Amendment :—The third para has been added by sec. 55 of the T. P. Amendment Act (XX of 1929). See Note 568 below.

560. This section, like sections 54 and 59, must be read as supplemental to the Registration Act. (See sec. 4 and notes thereunder). The effect of this section is to abolish optional registration in respect of leases mentioned in the second para of the section. Such leases may be effected

by simple delivery of possession without any written instrument; but if they are in writing and no possession is delivered, they must be registered (*O' Leary v. Maung On Gaing*, 4 Bur.L.T. 197, 11 I.C. 863) unless there is any Government Notification sanctioning the creation of such leases by unregistered writing only. And so, an unregistered lease for a term of less than one year is invalid if possession is not delivered to the lessee—*Gulab Khan v. Lal Muhammad*, 96 I.C. 410, A.I.R. 1926 Oudh 609. A lease for a period less than one year if made in writing (and not by an oral agreement accompanied with delivery of possession) must be registered under the 2nd para of this section, although it is not compulsorily registrable under sec. 17 of the Registration Act—*Rama Sahu v. Gowro Ratho*, 44 Mad. 55 (64) (F.B.). If such document is not registered, it will be inadmissible under the Transfer of Property Act for the purpose of proving the creation of a lease by its own force or for the enforcement of the terms of it, but it is valid under sec. 17 of the Registration Act, and is therefore admissible in evidence under sec. 49 of that Act for the collateral purpose of proving either an oral lease or for explaining the nature of the possession of the persons in occupation—*Ibid*; *Kidar Nath v. Dungar*, 32 P.L.R. 361, A.I.R. 1931 Lah. 501, 134 I.C. 289. See also the new proviso of sec. 49 Registration Act, cited under Note 289 at p. 253 *ante*, and in Appendix V.

The last para has been added by the Amendment Act VI of 1904, because of the Madras High Court decision in *Vairanandan v. Miyakan Rowther*, 21 Mad. 109 where it was held that leases falling under sec. 107 of the T. P. Act were compulsorily registrable notwithstanding the Government Notification issued under the proviso to sec. 17 (d) of the Registration Act.

561. Agricultural lease :—Sec. 117 makes this Chapter inapplicable to leases for agricultural purposes. Consequently, the letting out of agricultural land need not be by a registered document; it may be by oral agreement or even by conduct of parties—*Alam Mulla v. Surendra*, A.I.R. 1923 Cal. 432 (433), 69 I.C. 57; *Giribala v. Dwarka*, 55 C.L.J. 312, A.I.R. 1932 Cal. 715, *Mohadeo v. Sheoram*, 90 I.C. 51, A.I.R. 1926 Nag. 9. Where, however, the lease relates to agricultural land, but is not a lease for agricultural purposes (*e.g.*, where it is a lease granted to a rent-farmer or middleman) it is clearly governed by this Act, and can only be made under this section by a registered instrument—*Rash Behari v. Tiluckdhari*, 20 C.W.N. 485, 29 I.C. 797, 23 C.L.J. 111. A lease for planting *casuarina* trees is a lease for an agricultural purpose, and does not therefore require a registered instrument for its creation—*Panadai Pathan v. Ramasami*, 45 Mad. 710, A.I.R. 1922 Mad. 351.

562. Agreement of lease—Possession—Part performance :—If there is an agreement of lease, and the tenant enters into possession in pursuance of that agreement, it is not in the power of the landlord to repudiate the agreement. "A party who has permitted another to perform acts on the faith of an agreement shall not insist that the agreement is bad and that he is entitled to treat those acts as if it had never existed. Between landlord and tenant, when the tenant is in possession at the date of the agreement, the admission into possession, having unequivocal reference to contract, has always been regarded as an act of *part performance*"—*per* Plumer M.R. in *Morphett v. Jones*, (1818) 1 Sw. 172 (181): 13 R.R. 48; *Maddison v. Alderson*, (1883) 8 App. Cas. 467 (479).

It was formerly held that as this section refers to leases *i.e.* actual transfers of property, and not to an *agreement* to grant a lease, such an agreement, if made *orally* was valid; and if in pursuance of such agreement the intended lessee had taken *possession*, though the requisite document had not been executed, the position would be the same as if the document had been executed, provided that specific performance could be obtained between the same parties in the same Court and at the same time as the subsequent legal question fell to be determined—*Baranashi v. Papat Velji*, 25 C.W.N. 220, 63 I.C. 118 (124); *Chunilal v. Gopiram*, 45 C.L.J. 32, 100 I.C. 404, A.I.R. 1927 Cal. 275 (277). But then came the judgment of the Privy Council in *Ariff v. Jadunath*, 58 Cal. 1235, 35 C.W.N. 550, A.I.R. 1931 P.C. 79, 131 I.C. 762, which repudiated the doctrine of part performance, on the ground that in view of the provisions of sec. 107, the verbal agreement alone could not create a lease in favour of the so-called lessee, in the absence of a registered instrument, and that the English doctrine of part performance could not be invoked to override or nullify the statutory requirement of a registered document. The result is that in view of the authoritative decision of the Privy Council, the doctrine of part performance cannot be invoked in cases occurring before the Amendment Act of 1929 came into operation (1st April 1930).

But in cases which will be governed by the Amendment Act, the provisions of sec. 53A will come into play, but that section requires the agreement to be *in writing*; and if either party brings a suit for specific performance, the case will fall under the new sec. 27A, Specific Relief Act (added by the T. P. Amendment Supplementary Act XXI of 1929); but even under this Act there must be a document *in writing*, otherwise the lessee will not be allowed to rely on the doctrine of part-performance. Section 27A of the Specific Relief Act runs as follows:—

“27A. Subject to the provisions of this Chapter, where a contract to lease immovable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,—

Specific performance in case of part performance of contract to lease.

- (a) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract; and
- (b) where specific performance is claimed by the lessee, he has in part performance of the contract, taken possession of the property, or, being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

This section applies to contracts to lease executed after the first day of April, 1930.”

This section overrules the case of *Sanjib Chandra Sanyal v. Santosh Kumar Lahiri*, 49 Cal. 507, 26 C.W.N. 329, A.I.R. 1922 Cal. 436, 69 I.C. 877, in which it was held that if the lessee took possession under an *unregistered* agreement of lease, he could not sue for specific performance,

because he could not prove the agreement, it being unregistered. Under the present law, it is sufficient for a suit for specific performance if the document containing the contract of lease is in *writing* signed by the parties, and the lessee has taken possession.

The doctrine of part performance requires that there must be a contract of tenancy between the parties. But where there is no evidence to show that there was any agreement at all between the parties, much less is there evidence to show that the agreement, if any, was in the nature of a tenancy, and it has not been shown that the alleged tenant had at any time paid rent in respect of the land, *held* that there could be no presumption of tenancy from the mere fact of possession being held by the alleged tenant—*Mati Lal v. Darjeeling Municipality*, 17 C.L.J. 167, 18 I.C. 844 (845).

Part performance cannot override registration:—The doctrine of part performance can be invoked only in a suit for specific performance, but it cannot override the provisions of this section or of sec. 17, Registration Act, as regards registration. Therefore where a lease which ought to be registered has not been registered, the lessor cannot enforce the terms of the lease, by relying on the doctrine of part performance—*Baij Nath v. Kundan*, 1929 A.L.J. 1134, A.I.R. 1929 All. 831 (832), dissenting from *Jogendra v. Kurpal*, 49 Cal. 345. See the Report of the Special Committee cited under sec. 53A at pp. 242-243 *ante*.

563. Lease from year to year:—A lease is deemed to be from year to year when the lessor has at the end of the year no power to determine it—*Hand v. Hall*, 2 Ex. D. 318.

A *be-miadi patta* is a lease without a term or a lease not for a definite period, but one from year to year. Even though a *be-miadi patta* recites that the lessee and *his heirs and successors* should hold possession of the property, still the lease would not be construed as a permanent one—*Parshan v. Tulsi Kuer*, 2 P.L.J. 180 (182), 39 I.C. 658.

The words “this is to remain in force until another *patta* is granted” in a *patta* for one year, show an intention to create or regulate the terms of a tenancy beyond the year and from year to year—*Venkatachellam v. Audian*, 3 Mad. 358.

A lease of a hut or house which fixes a monthly rent is a monthly lease; it is not a lease from year to year by reason of the fact that the rent is made payable annually—*Mangal Singh v. Atra*, 3 Lah.L.J. 222, 60 I.C. 226.

564. Lease for a term exceeding one year:—A lease for one year certain with an expression on the tenant's part of readiness to hold the land longer at the same rent, if the landlord should so desire it, does not create in the tenant any interest exceeding beyond one year—*Apu Budgavda v. Narhari*, 3 Bom. 21. See also *Boyd v. Kreig*, 17 Cal. 548 and *Jagjivandas v. Narayan*, 8 Bom. 493. So also, a lease under which the lessor agrees to let his premises for a period of one year and also agrees “not to increase the rent nor to have the premises vacated for further two years if the said tenant wish to occupy it for that period” is not a lease for a term exceeding one year and is not therefore compulsorily registrable—*Beni Menahim v. Pebologo*, 8 Bom.L.R. 580. The reason is that if in a document in which the term of one year is specially prescribed, any subsequent words are used for the continuance of possession, they are to be considered to appertain to the future consent of the parties, and cannot in any way affect the actual term fixed—*Apu Budgavda v. Narhari*, 3 Bom. 21.

A lease for so long as the lessee continues to pay the stipulated rent is a lease not limited to one year—*Sheo Gholam v. Budrcenath*, 4 N.W.P. 36.

A lease of immoveable property for the life of the lessee is a lease for a term exceeding one year and must be registered—*Parsotam v. Nana*, 18 Bom. 109; *Wazir v. Ram Prasad*, 59 I.C. 893 (Pat.).

Though a Hindi Sambat year is more than one year calculated according to the English calendar, a lease for one Sambat year is not compulsorily registrable—*Moti Ram v. Seth Lakshmi Chand*, A.I.R. 1924 Nag. 216.

564A. Lease contained in several documents:—Where a lease is created by more documents than one, the whole correspondence, or at any rate the letters containing the offer and the acceptance, must be registered—*Morgan v. Fernandez*, 30 M.L.J. 519, 33 I.C. 439, 3 L.W. 370.

So also a document which varies the amount of rent paid under an existing registered lease, requires registration—*Lalit Mohan v. Gopalichak Coal Co.*, 39 Cal. 284 (F.B.).

565. Failure to give possession:—The first para of this section lays down that certain leases (*e.g.* a lease reserving a yearly rent) can be made only by a registered instrument, and in such leases *delivery of possession is not necessary* for the vesting of the interest in the lessee. The lessee, in spite of the fact that he has not obtained possession, holds the position of a lessee, and can maintain an action against the lessor for mesne profits as damages for keeping the lessee out of possession—*Razia Begum v. Md. Daud*, 6 Pat. 94, A.I.R. 1926 Pat. 508 (511), 96 I.C. 558. In England, however, livery of seisin is necessary to complete the title of the lessee, and he is not regarded as a tenant before actual entry; consequently he cannot maintain any action of the nature referred to above. This doctrine of English common law ought not to be applied in India—*Razia Begum v. Md. Daud*, *supra*.

As to the lessor's duty to give possession to the lessee, see Note 573 under sec. 108.

566. Effect of non-registration:—Persons who are in possession of property under unregistered lease-deeds are not trespassers but merely tenants-at-will—*Gaya Prasad v. Baijnath*, 14 All. 176; *Sheo Karan v. Parbhu Narain*, 31 All. 276; *Ram Chandra v. Syameshwari*, 42 C.L.J. 71, A.I.R. 1925 Cal. 1171 (1172); and the lessor is entitled to recover rent from them. Even if they are not liable to pay rent, they are still liable to pay compensation for use and occupation of the land—*Ajam Saheb v. Meenatchi*, 35 Mad. 95 (F.B.); *Sheo Karan v. Parbhu Narain*, 31 All. 276 (F.B.); *Ramchandra v. Tama Ragho*, 36 Bom. 500. But a suit originally brought for rent will not be allowed at a late stage of the case (*e.g.*, in second appeal) to be amended into one for use and occupation—*Surendra v. Bhai Lal*, 22 Cal. 752. In order that a plaintiff may get a decree for use and occupation on his failure to get a decree for rent, the claim must be specifically laid for rent and in the alternative for use and occupation—*O'Leary v. Maung On Gaing*, 4 Bur.L.T. 197, 11 I.C. 863.

An unregistered agreement of lease is a sufficient basis for a suit for specific performance. See Note 562 *ante* and sec. 27A, Specific Relief Act cited therein.

As regards the evidentiary value of an unregistered document of lease, see the new proviso to sec. 49, Registration Act (cited in Note 271 at p. 243 *ante*). The document is inadmissible to prove the tenancy, but it is admissible in evidence to prove the nature of the possession held under

the instrument—*Ram Sahu v. Gowro*, 44 Mad. 55 (F.B.). An unregistered document (lease-deed) though inadmissible for the purpose of affecting immovable property, may yet be looked to, not in any way as creating a title or as showing a transaction that affected the property, but merely as containing a clear and exhaustive statement of the adverse possession set up by a person holding under the unregistered deed—*Thakore Fatte Singhji v. Bamanji*, 27 Bom. 515. In a suit for rent, or for damages for use and occupation, the unregistered document of lease may be admissible in evidence for determining the amount of rent or establishing the rate of rent agreed upon between the parties, but in a suit to *enforce the terms* of the lease, the unregistered document would not be admissible to prove those terms—*Baij Nath v. Kundan*, 1929 A.L.J. 1134, A.I.R. 1929 All. 831 (832). The amount of rent mentioned in the unregistered document cannot be looked at in order to establish the rent fixed; it might be looked at in order to ascertain what amount the landlord suing for arrears of rent was entitled to by way of damages for use and occupation—*Kidar Nath v. Dungar*, 32 P.L.R. 361, 134 I.C. 289, A.I.R. 1931 Lah. 501 (502).

Although a tenancy cannot be established by reason of the fact that the lease-deed is not registered, yet it can be established if the defendants admit that they are tenants and that they had paid rent—*Venkatagiri v. Raghava*, 9 Mad. 142; *Ramchandra v. Ragho*, 36 Bom. 500.

567. Absence of writing and registration—Presumption:—Under this section, a lease from year to year, or for a term exceeding one year, or reserving a yearly rent must be made by a registered instrument. If, however, a (non-agricultural) lease is neither put into writing nor registered but is only accompanied by delivery of possession, the presumption will arise that the lease is from month to month (for which no writing is required), even though the rent appears to have been payable annually in a lump sum—*Debendra v. Shyama*, 11 C.W.N. 1124 (1126); *Sarat Chandra v. Jadav Chandra*, 44 Cal. 214; *Mohendra v. Narendra*, 50 I.C. 918 (Cal.); *Bisweswar v. Pitambar*, 51 I.C. 44 (Cal.); *Sheikh Akloo v. Emanon*, 44 Cal. 403, 33 I.C. 899. So also, where a person takes a lease at a fixed yearly rent, without settling the period of lease, and there is no written instrument, the presumption will be that he becomes a tenant for one year only—*Gobinda v. Dwarka*, 19 C.W.N. 489 (491), 26 I.C. 962. So again, a verbal lease for more than one year accompanied by delivery of possession, will be presumed to be a lease for one year only and is valid for one year—*Mohamed Musa v. Joganund*, 20 I.C. 715 (Cal.). A lease of a dwelling house must be presumed to be held on a monthly term where there is no written and registered contract to show that the lease was an annual one—*Shankar Ram v. Tulshi*, 2 P.L.T. 178, 61 I.C. 976; *Arunachella v. Ramiah*, 30 Mad. 109 (112). If the parties enter into an agreement for a lease for 15 years, and a document is executed but not registered, the effect is that the lease must be regarded as a lease for one year only, as a lease for a term exceeding one year can be made only by a registered instrument—*Matilal v. Darjeeling Municipality*, 17 C.L.J. 167, 18 I.C. 844 (845).

568. Kabuliyat:—The third para which has been newly added lays down that both the patta and the kabuliyat must be executed by the lessor and lessee respectively; in the absence of a patta, a mere kabuliyat executed by the lessee is of no avail. Prior to this amendment there was difference of opinion on this point, which will be evident from the undernoted cases,

It was held by the Allahabad High Court as well as Oudh and Nagpur Courts that where the plaintiff agreed to give the defendant a lease of the land for five years, and the defendant executed a registered *kabuliyat* to the effect, but *no patta* was written or registered, *held* that the transaction did not amount to a lease; in the absence of a deed of lease executed by the *lessor*, a *kabuliyat* executed by the *lessee*, even though registered and accepted by the lessor, was *not equivalent to a lease* for the purpose of this Act—*Kedar Nath v. Shankar Lal*, 46 All. 303 (309), 78 I.C. 934, A.I.R. 1924 All. 514; *Sheo Karan v. Maharaja Parbhu Narain*, 31 All. 276 (F.B.); *Raj Kuar v. Nabi Buksh*, 9 O.C. 296; *Nand Lal v. Hanuman*, 26 All. 368; *Kashi Gir v. Jogendranath*, 27 All. 136; *Ahmed Khan v. Sadasheo*, 80 I.C. 736, A.I.R. 1925 Nag. 121 (122). Where there was an unregistered *patta* as well as a registered *kabuliyat*, *held* that the *patta* being unregistered was ineffective to constitute a lease, and that the *kabuliyat* alone, though registered, did not create a lease—*Sikandar v. Bahadur*, 27 All. 462. The Rangoon High Court, following the Allahabad view likewise held that since according to the definition given in section 105, a lease was a transfer of a right to enjoy property, a *Kabuliyat* executed by the lessee could not be termed a lease, because it *did not transfer* any right in the property; it was merely an agreement to cultivate and pay rent—*U Tha Nyo v. Mg. Kyaw Tha*, 3 Rang. 379, 90 I.C. 693, A.I.R. 1925 Rang. 273, 4 Bur.L.J. 99; *Mg. Ba v. Htoon*, 5 Rang. 95, 102 I.C. 105, A.I.R. 1927 Rang. 169.

But the Calcutta High Court held in *Raimoni v. Mathoora*, 39 Cal. 1016, 16 C.W.N. 606, 14 I.C. 540, and *Dinanath v. Janakinath*, 55 Cal. 435, A.I.R. 1928 Cal. 393 (396), that a *kabuliyat* executed by the lessee constituted a valid lease, though no formal *patta* was executed by the lessor; and the same view was taken by the Madras High Court in *Syed Ajam v. Ananthanarayan*, 35 Mad. 95 (F.B.), 8 I.C. 668 (overruling *Turof Sahib v. Esuf Sahib*, 30 Mad. 322). The Bombay High Court was of opinion that a *kabuliyat* or rent note executed by the lessee *did not operate as a transfer* of an interest in the property to the lessee and could not therefore operate as a lease; but if the lessee obtained possession, such possession would then be attributable to the document (*kabuliyat*) he had signed, which had been registered and accepted by the lessor, so that in equity he would be entitled to retain his possession against the lessor seeking to eject him—*Ram Singh v. Bai Dyanba*, 27 Bom.L.R. 626, A.I.R. 1925 Bom. 512, 88 I.C. 648.

The Calcutta and Madras (Full Bench) rulings are now rendered obsolete by this new third para of sec. 107.

“There has been a difference of opinion whether a lease should be executed by both the lessor and the lessee or need only be executed by one of them. The Allahabad High Court holds to the view that a lease must be by deed signed by the lessor and that a unilateral document executed by a lessee alone does not constitute a lease (I.L.R. 26 All. 368; 27 All. 190; 31 All. 276). This view was taken by the Madras and Calcutta High Courts in the earlier cases (I.L.R. 30 Mad. 322; 32 Mad. 532; 14 C.W.N. 73), but was abandoned in Madras in 35 Mad. 95 and in Calcutta in 39 Cal. 1016. The Rangoon and Bombay High Courts adopt the Allahabad view (3 Rang. 379; 27 Bom.L.R. 626). It is desirable that a lease containing, as it usually does, covenants both on the part of the lessor and lessee, should be executed by both the lessor and the lessee.”
—*Report of the Special Committee*.

569. Delivery of possession:—It has been held under sec. 54 that a sale of immoveable property of value less than Rs. 100, which is already in the possession of the purchaser, need not be effected by any further delivery of possession, nor by registration. See Note 292 "Delivery of Possession" under sec. 54. The same principle will hold good in case of leases also. Therefore a lease not being a lease from year to year, etc., does not require any further delivery of possession or registration, where possession has already been delivered to the lessee under a prior valid lease. The correctness of this well-recognised principle has however been doubted in *Fakira v. Leakut*, 18 C.W.N. 858, 23 I.C. 318.

570. Leases by Government:—Leases granted by Government are outside the operation of the Transfer of Property Act. See the Crown Grants Act (printed in the Appendix). But although the Crown Grants Act exempts such leases from the operation of the Transfer of Property Act, it does not exempt them from the operation of the Registration Act; and the question whether a particular lease granted by Government does or does not require registration, is to be decided with reference to sec. 90 of the Registration Act. See *Munshi Lal v. Notified Area*, 36 All. 176, 12 A.L.J. 219, 22 I.C. 933; *Secretary of State v. Nistarini*, 6 Pat. 446, A.I.R. 1927 Pat. 319 (321, 322), 104 I.C. 209; *Kallingal Moosa v. Secretary of State*, 43 Mad. 65, 53 I.C. 345.

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following or such of them as are applicable to the property leased:—

Rights and liabilities of lessor and lessee.

A.—Rights and Liabilities of the Lessor.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is, and the latter is not, aware, and which the latter could not with ordinary care discover;

(b) the lessor is bound, on the lessee's request, to put him in possession of the property;

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease, and performs the contract binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to, and go with, the lessee's interest as such and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

B.—Rights and Liabilities of the Lessee.

(d) If, during the continuance of the lease, any accession is made to the property, such accession (subject to the law

relating to alluvion for the time being in force) shall be deemed to be comprised in the lease;

(e) if, by fire, tempest, or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision;

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor;

(g) if the lessor neglects to make any payment which he is bound to make and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor;

(h) the lessee may, *even after the determination of the lease*, remove, at any time *whilst he is in possession of the property leased but not afterwards*, all things which he has attached to the earth; provided he leaves the property in the state in which he received it;

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee, and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them;

(j) the lessee may transfer absolutely, or by way of mortgage or sub-lease, the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease;

nothing in this clause shall be deemed to authorize a tenant, having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer, or lessee;

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is

about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest;

(*l*) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf;

(*m*) the lessee is bound to keep, and on the termination of the lease, to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property, and inspect the condition thereof, and give or leave notice of any defect in such condition; and when such defect has been caused by any act or default on the part of the lessee, his servants, or agents, he is bound to make it good within three months after such notice has been given or left;

(*n*) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor;

(*o*) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings *belonging to the lessor*, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto;

(*p*) he must not, without the lessor's consent, erect on the property any permanent structure except for agricultural purposes;

(*q*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

Amendment:—Clauses (h) and (o) have been amended by sec. 56 of the T. P. Amendment Act (XX of 1929). See Notes 579 and 585 below.

571. Scope:—This section applies only in the absence of a *contract to the contrary*; it cannot apply if there is a contract to the contrary by which the rights of the parties are regulated—*Megh Lal v. Raj Kumar*, 34 Cal. 358 (371).

Agricultural leases:—Though this section is not applicable to agricultural leases (see sec. 117), yet the principles of this section ought to be followed in the case of such leases, as embodying the rules of justice, equity and good conscience—*Srinivas v. Ranga Swami*, 1 I.A.V. 858, 25

I.C. 812; *Narayan v. Krishna Rao*, 14 N.L.R. 188, 43 I.C. 970; *Penumetsa v. Gopisetti*, 40 I.C. 590.

572. Clause (a):—Material defects:—Compare notes under sec. 55, clause (a). A defect in the lessor's *title* cannot be said to be a material defect in the *property* within the meaning of this clause—*Syed Mukhtar v. Rani Sunder*, 17 C.W.N. 960 (963), 19 I.C. 815.

It is the duty of the landlord to inform his tenant of all latent defects in the property. Where the plaintiff hired a thatched bungalow of the defendant, entered into possession and after living in the house for some time, lit a fire in the fireplace in one of the rooms and the chimney took fire and the plaintiff's furniture was destroyed, and he subsequently ascertained that the chimney had been thatched over, of which fact he had been all along ignorant, it was held that the landlord was liable in damages for the loss sustained by him. The landlord should have given the tenant notice of the defective construction of the chimney; and in the absence of such a notice the tenant had a right to assume that it was properly built—*Radha Krishna v. O'Faherty*, 3 B.L.R. (A.C.) 277.

The landlord is bound to disclose the defects which exist at the time of granting the lease; it is not necessary that he should apprise the tenant of any subsequent deterioration of the demised property rendering it unfit for occupation—*Sarson v. Roberts*, (1895) 2 Q.B. 395 (399).

572A. Covenant of title:—Under this section the lessor's obligation to disclose defects is limited to "any material defect in the property with reference to its intended use." These words have reference only to the nature and condition of the property to be demised. No obligation as to *production of documents* or giving *answers to questions* (requisitions) is mentioned in this section. Clause (c) is a provision importing a covenant for quiet enjoyment, but there is no reference in the section to an implied warranty of *title*. The Legislature in adapting to sec. 108 the various clauses of sec. 55 have omitted clauses (b) and (c) of sec. 55 altogether, and the lessor has been relieved of the obligation to show his title to the property by producing the documents upon which he depends and verifying the documents and facts. And the lessee cannot call upon the lessor to produce satisfactory evidence of his title, before completion of the lease. But the Indian law makes no distinction in principle between the obligation of a lessor and of a vendor so far as regards the *duty to give a good title*, though the incidents of these different types of contract may be different as regards the obligation to give disclosure or to furnish proof thereof. The lessee may therefore repudiate a lease by proving that the title is bad. And this he can do, not necessarily by establishing that the lessor has no good right to convey, but by showing that the interest which would be conveyed to him (lessee) would be nugatory, precarious or incomplete; i.e., that the lessor's right in the land may be defeated by some event, or that the circumstances under which the lessor holds title may make it difficult or perhaps impossible for him to establish his right, or that the land is burdened with restrictive covenants or negative easements—*Jyoti Prosad v. H. V. Low & Co.*, 57 Cal. 1189, 34 C.W.N. 347 (351, 354, 355), A.I.R. 1930 Cal. 561, 128 I.C. 321.

573. Clause (b):—Delivery of possession:—Compare sec. 55, clause (1) (f).

This clause lays down that the lessor is bound, on the lessee's request, to put him in possession of the property, but it does not say that if the

lessor does not do so, the lessee is not bound to pay the rent. But non-delivery of possession is a good answer to a suit for rent—*Meenakshi v. Chidambaram*, 23 M.L.J. 119, 15 I.C. 711 (714). If the lessee obtains possession of only a *portion* of the property leased, he is not bound to pay rent for the portion of which he has not been given possession but is liable to pay rent only for the portion of which he has obtained possession—*Abdul Karim v. Upper India Bank*, 19 P.R. 1918, 40 I.C. 684 (685).

This section imposes an obligation on the lessor to put the lessee in possession, on a request being made to him to that effect. If the land is already in the possession of a third person to the knowledge both of the lessor and the lessee, it would be the duty of the lessor to make it possible for the lessee to take possession by removing the third person from the possession thereof, even though no express request for the purpose is made by the lessee. But where the lessee is acquainted with the land leased to him, and there is no obstruction or likelihood of obstruction to his going upon the land and taking possession of it, there is no duty on the lessor to put the lessee in possession unless the latter requests him to do so; and if the lessee neither requests the lessor to put him in possession nor himself chooses to take possession, he cannot resist a suit for rent on the ground of not getting possession—*Narayanaswami v. Yerramilli*, 33 Mad. 499 (501). If the leased land is in the occupation of a third person, *viz.*, a previous lessee, the present lessee is entitled to bring a suit for possession not only against the lessor but also against that third person; in fact the suit should be brought against both—*Bishen Sarup v. Abdul*, 1931 A.L.J. 666, A.I.R. 1931 All. 649 (651).

Where the property leased is in the occupation of raiyats, delivery of possession may be sufficiently given by the giving of a notice to the tenants requiring them to attorn and pay rent to the lessee—*Natesan v. Vengu Nachiar*, 33 Mad. 102 (110); *Zemindar of Vizianagram v. Behara*, 25 Mad. 587 (592); but the mere execution and delivery of the lease-deed would not in such cases amount to delivery of possession—*Zemindar of Vizianagram v. Behara*, 25 Mad. 587 (591). It should also be noted that a notice to the raiyats to pay rents to the lessee would amount to delivery of possession only where the lessor himself has possession to give, and not where he is himself out of possession—*Natesa v. Vengu*, *supra*; *Abdul Karim v. Upper India Bank*, 19 P.R. 1918, 40 I.C. 684 (685).

Where there is no dispute as to the identity of the subjects let, but the tenant denies that he has ever got possession of the subjects let, it is for the landlord to prove that he has discharged his obligation to put the tenant in possession, before he can enforce the tenant's liability to pay rent. The landlord must not only show that the tenant is in possession of the subjects of the lease, but that such possession is attributable to the lease or might be so. Where, however, the tenant has already paid rent under the lease, or where the tenant claims that certain subjects, of which he did not get possession are within the subjects let, which the landlord denies, the onus would primarily be on the tenant—*Jogesh Chandra v. Emdad*, 59 Cal. 1012 (P.C.), 36 C.W.N. 221 (229), A.I.R. 1932 P.C. 28, 136 I.C. 398.

Where the lessor has failed to put the lessee in possession, the lessee can sue the lessor either for the profits of the immoveable property wrongfully received by the lessor for the lessee's use, or for damages for breach of contract—*Zemindar of Vizianagram v. Behara*, 25 Mad. 587 (595); see also *Razia Begum v. Md. Daud*, 6 Pat. 94, A.I.R. 1926 Pat. 508 (511), 96 I.C. 558, cited in Note 565 under sec. 107.

574. Clause (c):—Covenant for quiet enjoyment:—The covenant for quiet enjoyment contemplated by this clause extends only to the disturbance of the lessee's possession by the lessor or by persons claiming under him or by his landlord, but not to disturbance by a trespasser—*Srinivasa v. Rangaswami*, 1 L.W. 858, 25 I.C. 812; *Syed Mukhtar v. Rani Sundar*, 17 C.W.N. 960; *Udai v. Katyani*, 49 Cal. 948, 35 C.L.J. 292; *Douzelle v. Girdharee*, 23 W.R. 121; *Dharam Narain v. Labh Singh*, 60 I.C. 477 (Lah.). The implied covenant protects the lessee against *all* disturbances by the lessor whether lawful or not; but as against *other* persons, it protects the lessee only against *lawful* disturbances—*Naurang v. A. J. Meik*, 50 Cal. 68 (74), 36 C.L.J. 28; *Banka Behari v. Madan Mohan*, 26 C.W.N. 143; *Indu Bhushan v. Chowdhury Moazam*, 33 C.W.N. 106 (111); *Wolton v. Hele*, (1670) 2 Wms. Saund. 177, 178 (b). The law has been thus stated by Woodfall, *Landlord and Tenant*, 16th Ed., p. 713; "The lessee is to enjoy the lease against the *lawful* entry, eviction or interruption of any man, but not against the *tortious* entries, evictions or interruptions, and the reason for the law is solid and clear, because against the tortious acts the lessee has his proper remedy against the wrong-doers." Therefore where the lessee is disturbed in his possession by the wrongful acts of trespassers and there was nothing to show that the trespassers were instigated by the lessor, the lessee is not entitled to suspend the payment of rent, and if he suspends the payment, the landlord is entitled to cancel the lease and evict the lessee—*Vithilinga v. Vithilinga*, 15 Mad. 111 (121).

The words "without interruption" in this clause are not qualified in any way, and have been understood to mean what is known in England as a covenant for quiet enjoyment in an *unqualified* form. In other words, the lessee is protected against interruption by whomsoever it is occasioned, *i.e.*, interruption caused by the lessor or by persons who claim under the lessor, or by persons claiming by *right paramount* to the lessor—*Tayawa v. Gurshidappa*, 25 Bom. 269 (273). The lessor is bound to protect the possession of the lessee against persons claiming under paramount *title*. Therefore, where the lessor knowing that he had no title gave a lease, but in consequence of his want of title failed to secure possession to the lessee or failed to secure him undisturbed possession, the lessee being ejected by the true owner of the land, *held* that the lessor failed to carry out the obligation imposed by this clause and was not entitled to recover rent—*Motilal v. Yar Mahammad*, 47 All. 63, A.I.R. 1925 All. 275, 85 I.C. 756; *Tayawa v. Gurshidappa*, *supra*. But the paramount title of a third party does not necessarily connote want of title of the lessor. And the lessee cannot claim abatement of rent by reason of being deprived of a portion of the lands owing to the Government having a paramount title thereto, unless he can establish his lessor's *defect of title* to that portion of the lands. Thus, where the Government made a survey of certain khas mahal lands adjoining the lands occupied by the lessee, and fixed the boundaries in such a way as to lessen the amount of the lessee's lands, he cannot claim an abatement of rent from his lessor, because it cannot be said that the lessee has been evicted from a portion of the lands by reason of any defect of title in his lessor—*Indu Bhushan v. Chowdhury Moazam*, 33 C.W.N. 106 (109), 117 I.C. 838, A.I.R. 1929 Cal. 272. "Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the grant and with it the corresponding liability for

payment of rent"—*per* Lord Buckmaster in *Malthey v. Curling*, [1922] A.C. 180.

The lessor is bound to protect the lessee against all disturbances caused by persons *claiming under him* (the lessor). This means that he is responsible for disturbances committed by a person claiming under him the right to do the act complained of, *i.e.*, the lessor becomes bound by any act of interruption caused by a person whom he has expressly or impliedly *authorised* to do the act. The lessor cannot be made responsible for all interruptions by any person claiming title through him, whether assignee or under-tenant, however wilful or negligent the interruption. This would be beyond reason; there must be some limit to the lessor's liability. Therefore, where A and B were the lessees of C to work adjoining mines, and A could not properly work the mine owing to the wrongful act of B, and claimed a reduction of rent, *held* that C could not be held liable for the wrongful act of B, as his act was unauthorised, and consequently A was not entitled to a reduction of rent. He had a remedy against B in tort—*Naurang v. A. J. Meik*, 50 Cal. 68, 36 C.L.J. 28, A.I.R. 1923 Cal. 41.

A covenant for quiet enjoyment means a covenant for quiet enjoyment by the tenant so long as it is lawful for him to enjoy the property; there cannot be a contract for the tenant's quiet enjoyment of the property contrary to law. In other words, a guarantee against the Acts of Legislature cannot be read into the implied conditions for quiet enjoyment. Consequently when the lessee is evicted by an Act of the Legislature (*e.g.*, when under the Epidemic Diseases Act it becomes unlawful for him to occupy the premises any longer in the manner contemplated by the lease) there is no breach of the lessor's covenant for quiet enjoyment, and the lessee cannot sue the lessor on the covenant. He will be liable to pay the rent for the whole period—*Merwanji v. Syed Sarder Ali Khan*, 23 Bom. 510. So also, if the lessee is ejected by Government acting under the provisions of the Land Acquisition Act, the lessee cannot sue the lessor for disturbance of possession—*Minto v. Kaleechurn*, 8 W.R. 527.

It should be noted that although this clause is worded in a conditional form ("if the latter pays the rent" etc.), it should not be construed to mean that the actual prior payment of the rent is a condition precedent to the lessee's right to quiet possession and enjoyment. It would be hardly reasonable to interpret this clause to mean that the failure to pay any instalment of rent would deprive a lessee of the right to continue in enjoyment of the leased property—*Meenakshi v. Chidambaram*, 23 M.L.J. 119, 15 I.C. 711 (713, 714).

If there is an interruption to the tenant's enjoyment of the property, his obligation to pay the rent ceases. And the tenant enjoys this immunity from the payment of rent until the landlord again permits him to have quiet enjoyment—*Meenakshi v. Chidambaram*, 23 M.L.J. 119, 15 I.C. 711 (714); *Dhunput v. Mahomed Kazim*, 24 Cal. 296. If the tenant is evicted from a *portion* of the property, the tenant is entitled to rescind the lease; but if instead of throwing up the lease, he elects to retain possession of the remaining portion, he cannot refuse to pay rent for that portion; he is bound to pay the rent for the portion retained, and is entitled to sue for damages in respect of the portion of which he has been deprived—*Meenakshi v. Chidambaram*, 23 M.L.J. 119, 15 I.C. 711 (716, 718). In other words, the tenant is not entitled to claim total sus-

pension of rent, but can claim only a proportionate abatement of the rent in respect of the portion from which he has been evicted. It should be noted that this rule of proportionate abatement of rent applies only where the rent is fixed at a *certain rate per bigha*; but where the rent is fixed in a *lump sum for the whole land* leased, treated as an indivisible subject, the tenant is discharged from the payment of the whole rent if he is evicted from any portion of the land—*Katyani v. Udoy Kumar*, 52 Cal. 417 (P.C.), 30 C.W.N. 1, 88 I.C. 410, A.I.R. 1925 P.C. 97.

575. Clause (d):—Accessions:—The true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord: and the tenant cannot be ejected from them while the tenure lasts—*Gooroodas v. Issur Chunder*, 22 W.R. 246. The Zamindar is not entitled to disassociate the accretions from the original grant and to turn the tenant out of the accreted lands, so long as the original holding continues—*Bhagabat v. Durga Bejai*, 16 W.R. 96. Nor is the tenant entitled to claim such accessions as his own property. The rule is that all increments made by the lessee upon land adjoining to or in the neighbourhood of his holding are presumed to have been made for the benefit of his landlord, and if the tenant has acquired a title against a third person by adverse possession, he has acquired it for his landlord and not for himself—*Naddyar Chand v. Meajan*, 10 Cal. 820.

Since the accretions become a part and parcel of the original tenure, the landlord cannot treat the accreted lands as a separate tenure altogether in order to claim compensation for use and occupation of such lands; but he is of course entitled to an additional rent which must be fixed after investigation into the value of the increment due to the accretion—*Assanullah v. Mohini Mohan*, 26 Cal. 739.

The rule in this clause does not apply where the tenant encroaches upon the *land of his landlord*. In such a case it is in the option of the landlord either to treat him as a trespasser (and thus to eject him out of the encroached lands) or to treat him as a tenant in respect of those lands. The tenant has no right to compel the landlord to treat him as a tenant. "It would seem strange, if, as a matter of law, a tenant were allowed, without the landlord's permission, to appropriate any land which adjoins his own tenure, and then when the landlord complained of the trespass and required him to give the land up, he were allowed to take advantage of his own wrong and to insist upon retaining possession of it until the expiration of his tenure"—*Naddyar Chand v. Meajan*, 10 Cal. 820. But once the landlord has accepted him as a tenant for some time in respect of the encroached lands, he cannot afterwards turn back and treat the tenant as a trespasser—*Khondar Abdul Hamid v. Mohini Kant*, 4 C.W.N. 508.

On the above principle, a tenant of land, even having a permanent right of tenancy on the land, cannot acquire an easement by prescription upon other lands of his lessor. For, a tenant is always a tenant and never an owner of the land. He always derives his rights from the lessor, and as the latter cannot have the right of enjoyment of an easement as of right against himself, so neither can his tenant against him—*Mani Chander v.*

Baikanta, 29 Cal. 363; *Udit Singh v. Kashi Ram*, 14 All. 185; *Jeenab Ali v. Allabuddin*, 1 C.W.N. 151.

576. Clause (e):—Destruction of property:—This clause applies where the house is rendered substantially and permanently unfit for the purpose for which it was leased. The mere fact that the house is damaged to some extent and is in need of immediate repair does not entitle the lessee to avoid the lease. Thus, where a house was damaged by earthquake and an Engineer who examined the house certified that the house was not in imminent danger but that it required immediate repairs in some portions, *held* that the building had not been rendered substantially and permanently unfit for occupation within the meaning of this section—*Donaghey v. Weatherdon*, 7 I.C. 201. In the case of a lease of coffee plants in the coffee garden it appeared that the whole of the plants had been absolutely destroyed by fire and the lessee consequently abandoned the garden before the period; the lessee was held not liable for the rent reserved under the lease—*Kanhayen v. Mayan*, 17 Mad. 98.

If the rent of the whole period of the lease had been paid in advance, but before the expiry of the period the leased property is destroyed by fire, the lessee is entitled to a refund of a proportionate part of the rent paid in advance, under sec. 65 of the Contract Act—*Dhuramsey v. Ahmedbhoy*, 23 Bom. 15.

Upon the destruction of the leased premises the lessee is entitled to treat the lease as void by giving a notice to the landlord; and as soon as he avoids the lease, he must vacate the building and give vacant possession of it to the landlord. He is not entitled to retain possession of the premises till such time as it suits him, and then make the destruction of the premises by fire the ground for putting an end to the lease so far as the remainder of the term is concerned—*Bruel & Co. v. Haji Siddick*, 12 Bom.L.R. 474, 6 I.C. 909. Unless he has given vacant possession of the house to the landlord, he cannot be said to have exercised his option of avoiding the lease. Where, therefore, a tenant who rented a godown gave notice to his landlord that he (the tenant) had exercised his option to terminate the tenancy upon the destruction of the godown, but it was found that several bags of sugar belonging to him were still lying in the godown, *held* that the tenant must be taken to have been in occupation either under his original tenancy or under a similar one resulting from his holding over, and was therefore liable for rent—*Siddick Haji v. Bruel & Co.*, 35 Bom. 333, 8 I.C. 1049.

Proviso to clause (e):—The lessee is not entitled to the benefit of clause (e) if the property is destroyed through the wrongful act of his own. Thus, the lessee of certain premises stored cotton bales therein, and left them in charge of a watchman. The watchman left a lighted kerosene oil lamp in close proximity to the bales, locked the place and went away to have his meals. The lamp burst, the cotton bales caught fire and considerable damage was caused to the leased premises by the fire. The lessor gave notice, in reply to which the lessee disclaimed all liability for the fire and determined his tenancy. *Held* that leaving a lighted kerosene oil lamp unattended and open to draught in close proximity to bales of cotton was an act of negligence of the lessee's watchman, and that the lessee was liable for the damage caused—*Girdaridoss v. Ponna Pillai*, 39 M.L.J. 233, 59 I.C. 252. But where the lessee of a building stored alcohol in it, and through some unknown cause fire broke out

and the building was burnt to ashes, and it appeared that the lessee's watchman was absent when the fire broke out, *held* that there was no negligence on the part of the lessee, as there was no relation of cause and effect between the absence of the watchman and the occurrence of the fire. Moreover, it could not be said that proof alcohol was a dangerous thing which a man could be said to store at his peril owing to its dangerous nature and which would impose a special responsibility on the lessee, in the absence of any special contract to this effect. Clause (e) makes a special exception in case of fire in favour of the lessee provided it is not caused by his own negligence—*East India Distilleries Ltd. v. Mathias*, 51 Mad. 994, 55 M.L.J. 663, 114 I.C. 234, A.I.R. 1928 Mad. 1140 (1141, 1142).

577. Clause (f)—Repairs:—None of the clauses of this section entitles the lessee to call upon the lessor to repair the property. Unless there is an express contract to that effect, the lessor is not necessarily bound to make any repairs whatever—*Bijoy v. Howrah Amta Light Ry.*, 38 C.L.J. 177, A.I.R. 1923 Cal. 524. This Act imposes no obligation on the landlord to repair. On the contrary, a qualified obligation in that respect lies on the tenant under clause (m)—*Lakhmichand v. Ratanbai*, 51 Bom. 274, A.I.R. 1927 Bom. 115 (118). In the absence of a contract to do repairs or of an obligation imposed by statute, there is no obligation on the part of the landlord to put the premises in a habitable condition—*Chappell v. Gregory*, (1864) 34 Beav. 529; or to do any repairs whatever upon them—*Gott v. Gandy*, (1853) 2 E. & B. 845, even though by neglecting to do so they become uninhabitable—*Arden v. Pullen*, (1840) 10 M. & W. 321.

Even if the lessor was under an obligation to effect repairs and fails to comply with the request of the lessee, the latter is not entitled to terminate the tenancy. He can execute the repairs himself after giving reasonable notice to the lessor and recover the amount expended by him by deducting it from the rent or otherwise—*Bijay v. Howrah Amta Light Ry.*, 38 C.L.J. 177, 72 I.C. 98, A.I.R. 1923 Cal. 524.

The tenant is entitled to deduct from the rent the expenses of necessary repairs done by him, even though there is a covenant in the lease to pay rent without deduction—*Graham v. Colonial Government*, 12 C.L.J. 351, 6 I.C. 131.

The tenant can deduct from the rent the expenses of only those repairs which the landlord was bound to execute, and if the landlord denies his liability to execute them, it is for the tenant to establish that the landlord was bound to execute them. The tenant is not relieved of this burden of proof by merely showing that the landlord had executed similar repairs in previous years—*Bolton v. Donald*, 3 A.L.J. 134.

578. Clause (g)—Payment by lessee for lessor:—A putnidar making certain revenue payments due by his defaulting superior landlord is entitled to recover the same from the latter, even though a separate account had been opened for such payments—*Smith v. Dinonath*, 12 Cal. 213.

The lessee can make only those payments on behalf of the lessor which the latter was bound by law to pay. Thus, where in execution of a decree against the lessor his interest in the property was put to sale, and the lessee deposited money under sec. 310A, C. P. Code, 1882 (now O. XXI, r. 89 of the Code of 1908) to set aside the sale, and brought a suit against his lessor to recover the money, *held* that the money paid

by the lessee under sec. 310A was not money which the lessor was *bound by law* to pay, and that therefore such payment did not afford any ground to sue the lessor for its recovery—*Bipin Behari v. Kalidas*, 6 C.W.N. 336.

579. Clause (h)—Removal of trees, fixtures:—The old clause ran thus: "The lessee may remove at any time during the continuance of the lease, all things, etc." That is, this clause only allowed the tenant to remove "*during* the continuance of the lease," all things which he might have attached to the land, and nothing was said as to the rights of the parties in respect of such things *after* the determination of the lease, if they had not already been removed by the tenant. The question arose whether the tenant forfeited all his rights in such things if he had not so removed them; and it was held that according to local usage, the option was with the lessor either to take the building on paying compensation, or if he was unwilling to pay compensation, to allow the tenant to remove the building—*Ismail Kani v. Nazarali*, 27 Mad. 211 (217); *Angammal v. Aslami Sahib*, 38 Mad. 710 (735); *Kanai Lal v. Rassik Lal*, 19 C.W.N. 361, 23 I.C. 762. Where the terms of the lease did not provide for payment of compensation to the tenant, the Court had a discretion, in a proper case, to allow *reasonable time* to the tenant after the expiry of the tenancy to remove his superstructure from the land—*Raja Avergal v. Noor Mohamed*, 66 I.C. 48, A.I.R. 1922 Mad. 349; *Angammal v. Aslami Sahib*, 38 Mad. 710 (736); *Govinda v. Charusila*, 60 Cal. 1042, 37 C.W.N. 791 (795), A.I.R. 1933 Cal. 875. Where after the termination of the tenancy, the tenant took no steps for 2 years to remove his structures, and after 2 years brought a suit to remove the structures or to recover compensation, his claim must be disallowed—*Govinda v. Charusila*, *supra*.

The present clause, as now amended, allows the tenant to remove the fixtures even *after* the determination of the lease, *so long as he is in possession*, but not afterwards.

"The use of the words 'during the continuance of the lease' in section 108, sub-section (h), has given rise to a conflict of judicial opinion (I.L.R. 38 Mad. 710 and the cases considered there). In English law the 'time of removal' is not certain. 'It has been said to extend "to such further period of possession by the tenant as he holds the premises under a right still to consider himself as tenant", or as he holds them "in the capacity of a tenant"—a period which has been described as an *excrescence* or an *enlargement* of the term. It has also been said that possibly this may intend a tenancy at sufferance, but at any rate not after the landlord has determined it by a re-entry, or by the issue of a writ in ejectment' (Foa on Landlord and Tenant, p. 784, 6th Edn.). We think it desirable to remove all uncertainty regarding the tenant's right of removal. We think it would be consistent with justice if the tenant is allowed to remove his fixtures so long as he is in possession of the property even though the tenancy has come to an end. This would make the period certain, and it is immaterial whether the tenant vacates voluntarily or is compelled to vacate by process of law. The landlord does not suffer, because if the tenant is in wrongful possession, the landlord will be entitled to damages. If the tenant is in rightful possession, he obviously ought to have the right to remove his fixtures. In either case

the certainty of the period would work less hardship than the present uncertainty.

"It may be said that a dishonest tenant may take advantage of the proposed rule and keep the landlord out of possession for an indefinite period. But such a tenant can do so whether he has fixtures or not, and in either event the landlord has his remedy in damages."—*Report of the Special Committee*.

The amended clause has introduced no new principle but has only extended the period within which the tenant could remove, beyond the 'continuance of the lease' to any further time during which he is in possession of the property leased. The old clause (h) limited the tenant's right to remove as a right to be exercised during the term, but it failed to notice that cases of hardship might arise where a tenancy was suddenly determined *e.g.* by a mortgagee's sale or by Land Acquisition proceedings. These difficulties have been removed in the amended clause by an extension of the period—*Govinda v. Charusila*, 60 Cal. 1042, 37 C.W.N. 791 (796).

This section is subject to a contract to the contrary; and so where the terms of the lease provided that "on determination of the tenancy the erections raised on the premises would belong to the lessor, unless the lessee removed them on the determination of the lease or within 2 months thereafter, upon payment of all rent due and performance of all conditions"; and the lease was determined for non-payment of rent, whereupon the lessee agreed to the lessor's entering into possession, *held* that the fixtures would pass to the lessor—*Cook & Co. v. Phillips*, 34 C.W.N. 785 (788), 130 I.C. 222, A.I.R. 1931 Cal. 133.

Apart from estoppel or contract, the tenant has no right to *demand compensation* for buildings left by him on the premises when he quits them. In the absence of evidence of an express consent on the part of the landlord to the erection of the superstructure by the tenant, the mere fact that the landlord knew of the construction of the building would not lead to the presumption that there was any undertaking by the landlord to pay for the house if the tenant did not remove it—*Angammal v. Aslami Sahib*, 38 Mad. 710 (735).

If after the tenant has erected buildings on the land, the lease turns out to be invalid, the tenant is only entitled to have the superstructure removed by him, and not to any compensation—*Govindsami v. Ethirajammal*, (1916) 1 M.W.N. 180, 34 I.C. 1.

This clause should be read with clause (o), and the meaning of the two clauses read together is that the lessee is entitled to remove those trees and buildings which he himself has attached to the earth, and that he is prohibited from removing the trees and buildings which he has not himself attached to the earth and which stood on the land at the time of the lease—*Vasudeva v. Valia*, 24 Mad. 47 (53); *Gangamma v. Bhommakka*, 33 Mad. 253; *Kedar Nath v. Govinda*, 32 C.W.N. 366 (371), 108 I.C. 242. Prior to the passing of the T. P. Act there was no distinction between trees standing on the land when the tenancy was created and trees planted by the tenant, and the property in both kinds of trees was in the landlord, and the tenant had a right to remove them only if there was any custom or usage to the contrary—*Kedar Nath v. Govinda*, *supra*.

'Attached to the earth':—For the meaning of this term, see Note 20 under sec. 3 and Note 78 under sec. 8.

A tenant who has planted trees on the land has the right of cutting down and making use of them—*Sitabai v. Shambhu*, 38 Bom. 716. A lessee may remove trees which he has himself planted and buildings which he has himself erected, provided he leaves the property in the state in which he received it—*Vasudeva v. Valia*, 24 Mad. 47 (53) (F.B.).

A trade fixture, *i.e.* a fixture put up for business can be removed by the tenant—*Chaturbhuj v. Bennett*, 29 Bom. 323 (335).

Clause (i)—Growing crops:—Compare the last para of sec. 51.

580. Clause (j)—Transfer by lessee of his interest:—This clause is *not retrospective*, and does not apply to tenancies created *before* the passing of this Act—*Madhab Chandra v. Bijoy Chand*, 4 C.W.N. 574; *Hari Nath v. Raj Chandra*, 2 C.W.N. 122; *Umakanta v. Kashiram*, 23 I.C. 246 (Cal.); *Mohendra v. Krishna Kumari*, 46 I.C. 656 (Cal.). Thus, a permanent tenancy created before the passing of this Act for the purposes of habitation cannot be transferred (even though no buildings have been erected on the land for the purpose of habitation), if the document creating the tenancy does not confer upon the lessee the right to transfer and there is no evidence of a local custom in favour of such transfer—*Safar Ali v. Abdul Rashid*, 39 C.L.J. 585, A.I.R. 1924 Cal. 1012. So also, a tenancy of homestead land from year to year which was in existence before the passing of this Act and which was not transferable except by custom, is not governed by this Act, and this clause does not make it transferable absolutely or by way of sub-lease—*Ananda Mohan v. Govinda*, 20 C.W.N. 322, 33 I.C. 565 (567); *Ramcharan v. Hari Charan*, 7 C.L.J. 107; *Umakanta v. Kashiram*, 23 I.C. 246 (Cal.); *Madhusudan v. Kamini*, 32 Cal. 1023; *Sarada Kanta v. Nobin Chandra*, 54 Cal. 333, 31 C.W.N. 231 (234), A.I.R. 1927 Cal. 39. If the lease of homestead land is created *after* this Act, the interest of the lessee is transferable under this clause—*Mohendra v. Krishna Kumari*, 46 I.C. 656 (Cal.). A non-agricultural tenancy created *after* the passing of this Act is transferable, unless any custom or contract is established to the contrary—*Kishori Lal v. Kamini*, 37 Cal. 377 (383).

In spite of the rule contained in this clause as to the alienability of leases, it is open to the parties to covenant against such alienation; and a sub-lease given in contravention of such covenant is invalid as between the original lessor and lessee, though it is valid as between the original lessee and the sub-lessee—*Abdulla v. Mahammad*, 26 Mad. 156; and the landlord will be entitled to bring a suit for damages—*Sital Prosad v. Dildar Ali*, 1 P.L.J. 1, 33 I.C. 408.

A lessee cannot make an underlease for a longer term than his own lease. If an underlease mentions no term, it cannot be construed to have effect beyond the interest of the grantor—*Harish Chunder v. Sree Kali*, 22 W.R. 274.

This clause provides that the liability of the lessee shall not cease by reason only of the transfer. Therefore, a lessee does not cease to be liable to pay rent to his landlord even after he (lessee) has transferred his interest in the property leased—*Bhola Nath v. Durga Prosad*, 12 C.W.N. 724; *Manmatha v. Balai*, 70 I.C. 111, A.I.R. 1924 Cal. 359; *Manmatha v. Nalinaksha*, A.I.R. 1925 Cal. 423; and it is no answer to a suit for rent brought by the landlord against the lessee, that the transferee from the lessee is willing to pay the rent—*Akrurmani v. Madhab Chandra*, 47 I.C. 800 (Cal.). In a lease-deed the lessor recited as follows:

"You (lessee) shall not be competent to transfer this ijara right in any way by gift, sale, etc.; and if you do so the same shall not be binding on me. You together with your heirs shall remain bound to pay the rent duly. But if on account of the intricacies of law any transfer made by you becomes in any way binding on me, then you and your heirs shall remain bound to pay the fixed amount of rent so long as the transferee will not furnish security to be fixed by me for the due payment of rent." The lessees transferred their interest, and the question was whether they continued to be liable for the rent. *Held* that the proper construction of the covenant is that the lessor would not be bound to recognise any transfer but would be entitled to hold the original lessees liable for the rent, but that if on account of some legal technicality the lessor becomes bound to recognise the transferee, even then the lessees would be bound to pay the rent unless security is offered. The covenant does not mean that whenever the lessees choose to transfer the leasehold interest, the lessor would be bound to fix the security for the due payment of the rent which the transferee would be required to give, and the original lessees would be exonerated from their personal liability to pay rent. The lessees therefore did not cease to be liable for the rent—*Satyaniranjan v. Sarajubala*, 33 C.W.N. 865 (871); affirmed 33 C.W.N. at p. 872 (P.C.). The lessee's liability (e.g. to pay rent) does not cease even though he gives notice of the transfer to the landlord. The mere giving of a notice of the assignment of the lease cannot put an end to the liability of the lessee at his pleasure, unless the lessor consents to it. The landlord is entitled to hold the tenant liable under the original contract, and there is nothing in this clause to countenance the construction that a right so belonging to the landlord may be put an end to without any act or consent on his part, and solely at the will of the person on whom the liability rests—*Sashi Bhushan v. Tara Lal*, 22 Cal. 494 (500); *Satyaniranjan v. Sarajubala*, 33 C.W.N. 865 (870); affirmed 33 C.W.N. at p. 872 (P.C.).

But when, after a tenant has transferred his interest to another, the landlord accepts rent from the transferee, the presumption is that the latter is accepted by the landlord as his tenant—*Nabakumari v. Behari Lal*, 34 Cal. 902 (P.C.). The lessee shall cease to be liable if the lessor accepts rent from the assignee and thereby creates *privity of contract* between himself (lessor) and the assignee—*Thethalan v. Eralpad*, 40 Mad. 1111 (1113).

The assignee also is liable to the original lessor in respect of all covenants running with the land; and since a covenant to pay rent is a covenant running with the land, it follows that the assignee is directly liable to the lessor for the payment of rent. This clause provides that the lessee shall not, by reason of transfer of his interest, cease to be subject to the liabilities under the lease; but from this it does not follow that the transferee is not also liable. The lessor may at the same time sue the lessee on the express covenant and the assignee upon the privity of estate, though he can have execution against one only—*Kunhamian v. Anjelu*, 17 Mad. 296; *Manmatha v. Nalinaksha*, A.I.R. 1925 Cal. 423, 79 I.C. 557; *Govinda v. Md. Hosain*, A.I.R. 1925 Sind. 296, 87 I.C. 802.

Privity of estate:—The liability of the assignee of a lease to pay rent to the landlord arises by reason of the *privity of estate*, and this privity of estate is created by the *transfer* to him and not by his obtaining *possession*. Similarly, when the assignee in turn assigns over, his privity of

estate ceases and consequently his liability also ceases in respect of breaches of covenant committed after he has assigned over—*Saldanha v. Subraya*, 30 Mad. 410; *Mehta v. Gadadhar*, 37 Cal. 683. This clause recognises the right of a lessee to transfer his privity of estate to an assignee, thus rendering the assignee liable, while at the same time he continues liable by reason of his privity of *contract* which does not pass by the assignment—*Saldanha v. Subraya*, 30 Mad. 410; *Smith v. Gronow*, (1891) 2 Q.B. 394.

Since the privity of estate is created by *transfer* and not by *possession*, it follows that mere possession of a leasehold property will not render a man liable for rent, if the lease has not been assigned to him—*Ananda v. Abdullah*, 41 Cal. 148 (155). Moreover, the liability of the assignee for rent arises from the date of the *assignment* and not from the date of his taking possession—*Saldanha v. Subraya*, 30 Mad. 410; *Bengal National Bank v. Janoki*, 54 Cal. 813, 31 C.W.N. 973, A.I.R. 1927 Cal. 725 (730), 104 I.C. 484.

These principles relating to the privity of estate between the lessor and the lessee's assignee apply when the *whole* of the lessee's interest is assigned over. But no privity of estate arises when a *subsidiary* interest is carved out of the lessee's interest, as where the lessee *mortgages* or *sublets* his leasehold interest. There is no privity of estate between a lessor and the mortgagee from the lessee. Therefore, when the lessee mortgages his leasehold interest (even with possession), the mortgagee is not liable to the lessor for rent, there being neither privity of estate nor privity of contract between the parties—*Thethalan v. Eralpad Raja*, 40 Mad. 1111 (1112, 1114), 40 I.C. 841. Similarly, a *sub-lease* differs from an absolute assignment of a lease, in that it creates no privity of estate between the sub-tenant and the landlord. The landlord has to deal with his lessee and not with the sub-tenants of the latter—*Timmappa v. Rama*, 21 Bom. 311 (313). But where the mortgage is an *English mortgage* of a leasehold interest, by which the lessor parts with all his right, title and interest in the lease (*i.e.*, parts with his *whole estate*), a privity of estate is created between the lessor and the mortgagee, and the latter is bound to the former for rent—*Bengal National Bank v. Janoki Nath*, 54 Cal. 813, 31 C.W.N. 973, 104 I.C. 484, A.I.R. 1927 Cal. 725 (729).

These cases lay down the principle that a privity of estate arises between the lessor and the lessee's transferee, not by reason of the fact that the transferee enters into *possession* but by reason of the fact that the *whole interest* of the lessee is assigned over to the assignee; and that no privity of estate arises when only a partial interest is transferred (by way of simple mortgage or sub-lease). In an English case, Lord Mansfield held that the mortgagee of a leasehold interest, even when the mortgage was by way of assignment of the whole term, was not liable for rent by virtue of privity of estate, unless he obtained *possession* as well—*Eaton v. Jaques*, (1780) 2 Doug. 455. But this view was overruled in the subsequent case of *Williams v. Bosanquet*, (1819) 3 Moore 500, 21 R.R. 585. In *Vithal v. Shriram*, 29 Bom. 391, it was stated rather broadly that a mortgagee of a leasehold interest, *if in possession*, was liable for rent to the lessor, although there was no privity of estate between them; but this case has been dissented from in 40 Mad. 1111 and 54 Cal. 813. As observed by Wallis, C.J., if actual possession were

to make one liable for rent, then the sub-lessee would be liable for rent to the lessor—a view which is clearly untenable—*Thethalan v. Eralpad*, 40 Mad. 1111 (1114). In *Kannye Loll v. Nistarini*, 10 Cal. 443 (444) also it was held that if a mortgagee of a leasehold property was put into possession, he was liable for rent to the landlord; but it was found in this case that the mortgage amounted to an assignment or transfer of the *whole* of the leasehold interest.

A mortgagee of a lease who has *foreclosed* is liable for rent to the lessor, because in such a case the entire interests of the lessee and the mortgagee have become by operation of law merged in the person of the latter—*Macnaghten v. Bheekaree*, 2 C.L.R. 323.

All the above cases (except 29 Bom. 391) uniformly require that for the mortgagee to be liable for rent, the whole of the lessee's interest must have been transferred. Where the mortgage is in the English form, no difficulty arises; the difficulty is in those cases where the mortgage is in the form more generally employed in the mofussil. In those cases liability is not based upon possession as such, but the fact of possession must be taken into account as a matter for consideration in determining whether the whole interest of the lessee has been transferred to the mortgagee—*Bengal National Bank v. Janoki Nath*, *supra* (*per* Buckland, J.).

581. Occupancy tenure:—In Bengal, an occupancy holding has been made transferable by section 26B of the Bengal Tenancy Act (as amended in 1928).

Clause (k):—Compare clause (5) (a) of sec. 55. The distinction between sec. 55 and the present section is that while under the earlier section the non-disclosure amounts to fraud on the part of the purchaser and entitles the vendor to rescind the contract of sale, a non-disclosure under this clause has no such serious effect but only entitles the lessor to sue for compensation.

582. Clause (l):—Payment of rent:—The tenant's liability to pay rent commences from the date he is put into possession and not from the date when the landlord merely signs the lease—*Shama Prasad v. Taki*, 5 C.W.N. 816; and the tenant is not bound to pay rent for the portion of the property of which he has not obtained possession—*Siba Kumari v. Bipprodas*, 12 C.W.N. 767.

This clause makes it obligatory on the tenant to pay or tender the rent at the proper time and place. There is nothing in this section to require the lessor to make a *demand*—*Allibhoy v. Gordhandas*, 23 S.L.R. 29, A.I.R. 1929 Sind 13, 111 I.C. 530.

As to the tenant's right to suspend payment of rent in case of obstruction to his possession or deprivation of the whole or portion of the land, see Note 574 *ante*.

This Act gives no authority to a landlord to enhance the rent of his tenant during the term of the lease, whether it be in perpetuity or for a definite term—*Satish Chander v. Rai Jatindra*, 7 C.L.J. 284.

But a stipulation that if a tenant does not pay rent on the due date interest shall be charged on the arrears, is enforceable—*Bhyrub v. Meer Ameeroodeen*, 17 W.R. 173; and the mere omission to claim interest for some time cannot amount to a waiver of the landlord's right to claim interest at the stipulated rate—*Shyama Charan v. Heran Mollah*, 26 Cal. 160; *Jahoory v. Bullab*, 5 Cal. 102. Moreover, the Court has no power

to reduce the stipulated rate of interest payable upon non-payment of rent in due time—*Sayed Shahid Hussain v. Jagmohan*, 2 P.L.T. 276, A.I.R. 1921 Pat. 301.

Concurrent lease:—When a lessor executes two concurrent leases of the same property, that is to say, two leases in which the term of the second commences before the term of the first has expired, the second lessee is to be taken as the assignee of the lessor's interest during the concurrent portion of the terms, and the lessor after the execution of the second lease can recover rent only from the second and not from the first lessee—*Ram Anant v. Shanker*, 30 All. 369.

583. Clause (m):—Repairs by lessee:—This clause lays down that on the termination of the lease the lessee is bound to restore the property in as good condition as it was in when he was put in possession. But this does not mean that if a tenant has taken a house which is out of repairs, he should put it in repairs when the lease comes to an end; but he is bound to maintain and restore the property in the condition in which it was when it was leased out to him. If the building when demised was an old one, and there was a covenant to repair, it is not necessary that the old building be delivered up in a renewed form—*Lister v. Lime* (1893) 2 Q.B. 212.

The implied obligation of a tenant from year to year is to keep the premises wind and watertight—*Anworth v. Johnson*, (1832) 5 C. & P. 239; *Leach v. Thomas*, (1835), 7 C. & P. 327; *Wedd v. Porter*, [1916] 2 K.B. 91 (100); and to make fair and tenantable repairs—*Cheltham v. Hampson*, (1791) 3 T.R. 313; *Gregory v. Mighell*, (1811) 18 Ves. 328 (331); as by putting fences in order, or replacing windows or doors that are broken during his occupation or cleansing drains and sewers—*Russell v. Shenton*, (1842) 3 Q.B. 449.

This clause which directs the lessee to restore the property in the same condition in which it was let, subject to the change caused by reasonable wear and tear or by any irresistible force, has no application where the parties have fixed their own terms and made their own bargain. Thus, where the lessee covenanted to keep the premises "wind and watertight and in habitable condition" and the premises were subsequently damaged by an earthquake, *held* that as the parties had made their own terms as to the condition in which the lessee was to keep the house and in which it was to be delivered up at the end of the term, the lessee was bound by his contract to make good the damage, irrespective of whether or not the damage was caused by earthquake or any other irresistible force—*Heckle v. Tellery*, 4 C.W.N. 521. But in such a case the lessee is not liable to do all and every repair that is necessary by reason of the earthquake, but only to make good the damage to the extent of making the premises "wind and watertight and in habitable condition"—*Ibid.* All that the lessee is bound to do is to put the premises in such repair as having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it—*Proudfoot v. Hart*, 25 Q.B.D. 42, cited in the above case. When there is a covenant in a lease to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to be left—*Sarafali v. Subraya*, 20 Bom. 439 following *Joyner v. Weeks*, [1891] 2 Q.B. 31 (43).

The general rule of law with respect to covenants to repair is that where the covenant to repair is in general terms to keep the premises in repair, the covenant will attach to *new buildings* which are subsequently erected upon the demised premises during the currency of the term. On the other hand, where the covenant to repair refers to certain specified property that is demised, such as the "said buildings" or the "said houses," then unless the additional buildings in fact become part of the specific buildings which the tenant covenanted to repair, the covenant will not extend to such new and separate erections. Whether or not a covenant to repair extends to any particular property depends upon the terms of the covenant and the facts proved in the case under consideration—*Debendra v. Cohen*, 54 Cal. 485, A.I.R. 1927 Cal. 908 (910), 106 I.C. 477. If the new buildings are so constructed that they cannot be treated as separate buildings but are in fact and in truth made part of the original buildings, the covenant to repair would extend to such new erections—*Debendra v. Cohen*, supra; *Cohen v. Debendra*, 32 C.W.N. 154 (157, 158), 107 I.C. 86, A.I.R. 1928 Cal. 89. "A general covenant to repair includes not merely buildings existing when the demise is made, but all those which may be erected during the term"—*Field v. Curnick*, [1926] 2 K.B. 374; *Cornish v. Cleife*, (1864) 3 H. & C. 446; *Foa's Landlord and Tenant*, 6th Edn., p. 248.

Destruction by fire:—A lease of a building for the purpose of storing alcohol and other spirits for a distillery contained a covenant that "the lessees on the expiry of the period of lease should restore the building at their own cost to the condition in which they took the same, and that in case the lessees fail to remove the additions and alterations made by them and to restore the building to its original and habitable condition at their own cost, the cost thereof shall be paid by the lessees to the lessor." The building having been subsequently accidentally burnt down by fire, the lessor sued the lessee for damages for reinstatement of the building. *Held* that the covenant merely intended that any structural alterations made by the lessees for the purposes of their business should be restored on the expiration of the lease so as to make the building suitable for occupation as a dwelling house; that the covenant did not refer to the complete destruction of the building and its complete reinstatement; that the T. P. Act clearly contemplates that a lessee should not be responsible for the consequences of fire unless he has definitely taken that burden on his own shoulders by his covenant; and that as the covenant of this lease did not contemplate the case of fire at all, the lessee could not be made responsible for the damage—*East India Distilleries Ltd. v. Mathias*, 51 Mad. 994, 55 M.L.J. 663, A.I.R. 1928 Mad. 1140 (1141, 1142), 114 I.C. 234.

584. Inspection by landlord:—Under the English law, the landlord has no right to go upon the premises if he desires to make repairs, and if he does so in the absence of an express power in the lease, he will be guilty of trespass and may be restrained by injunction, although the non-repair may cause a forfeiture of his own lease—*Barker v. Barker*, (1829) 3 C. & P. 557; *Stocker v. Planet Building-Society*, (1797) 27 W.R. (Eng.) 793.

Clause (n):—This clause throws a duty upon the lessee in order that the lessor may, if he chooses, protect his own interest and may be safeguarded against the results of a collusive eviction submitted to by the lessee—*Indu Bhusan v. Chowdhury Moazam*, 33 C.W.N. 106 (111).

585. Clause (o)—Scope:—This clause deals with the ordinary rights of a lessee in an ordinary lease, and its terms cannot be held to cut down the right to work a mineral expressly conveyed—*Satya Niranjan v. Ram Lal*, 4 Pat. 244 (P.C.), 29 C.W.N. 725, 86 I.C. 712, A.I.R. 1925 P.C. 42.

The words “belonging to the lessor” have been added to this clause for the following reasons:—

“Sub-section (o) of section 108 provides that the lessee must not fell timber or pull down or damage buildings, but does not make a distinction between timber or buildings belonging to a lessor and those belonging to a lessee. To make this point clear we propose to add the words ‘belonging to the lessor’ after the word ‘buildings’.”—*Report of the Special Committee*. This view was also expressed in a Madras case, where it was remarked that the prohibition in regard to the felling of timber and pulling down of buildings in clause (o) did not limit the right declared by clause (h), but was subject to that right; that is, the lessee was prohibited to fell timber or pull down buildings, unless the timber was planted or the buildings erected *by the lessee himself*—*Vasudevan v. Valia*, 24 Mad. 47 (53), followed in *Kedar v. Gobinda*, 32 C.W.N. 366 (371), 108 I.C. 242. In another Madras case also it was pointed out that clause (h) authorises the lessee to remove only those things which he *himself has attached* to the earth, and clause (o) prohibits a lessee from cutting down timber; the conclusion is that the lessee cannot cut down trees which he himself has not planted and which were already in existence at the time of the grant of the lease—*Gangamma v. Bhammakka*, 33 Mad. 253; see also *Kedar v. Gobinda*, 32 C.W.N. 366 (371). This is now made clear by the Amendment.

Jack trees are both *timber* and fruit trees, and the lessee cannot cut them—*Gangamma v. Bhammakka*, 33 Mad. 253 (254).

Acts of waste:—The following are “acts destructive or permanently injurious to the property”:—

(a) Felling timber (see the section); “cutting down, destroying or tapping all trees which are timber either by the general law or by the particular custom of the country, is waste”—Woodfall, 16th Edn., p. 660.

(b) Pulling down or damaging buildings (see the section);

(c) Working mines or quarries not open when the lease was granted (see the section); *In re Purmanandas*, 7 Bom. 109; *Christian v. Tekaitni*, 19 C.W.N. 796.

(d) Converting arable land into wood and conversely meadow into arable land; suffering houses to be uncovered, whereby the rafters or other timber of the houses become rotten; permitting the walls of houses to decay for defaults of plastering; suffering the house to be wasted and then felling down timber to repair the same, etc.—Woodfall's *Landlord and Tenant*.

(e) Making bricks upon land not specially let for the purpose—*Anund v. Bissonath*, 17 W.R. 416.

(f) Digging a tank on the property demised for agricultural purposes—*Tarini v. Debnarayan*, 8 B.L.R. App. 69;

(g) Converting land under cultivation into a mango-grove—*Lakshman v. Ram Chandra*, 10 Mad. 351; *Bholoi v. Raja of Bansi*, 4 All. 174.

(h) Making excavations of such a character as to cause substantial damage to the property demised, although the lease permits the lessee to make excavations—*Girish v. Sirish*, 9 C.W.N. 255.

Acts not amounting to waste:—

(a) Planting trees on the holding so long as it does not materially affect the character of the holding, even though the patta prohibits the planting of new trees—*Krishna Das v. Venkatappa*, 9 M.L.J. 146.

(b) Planting cocoanut trees in land cultivated with ragi and paddy by an occupancy tenant paying a fixed money rent—*Venkaya v. Ramasami*, 22 Mad. 39.

(c) The digging of a well, especially if it is a *chaunda* well of a temporary nature—*Bholoi v. Raja of Bansi*, 4 All. 174.

(d) Merely allowing the land to remain uncultivated—*Dinabandhu v. Lokanadhasami*, 6 Mad. 322.

(e) Agricultural tenant letting part of the demised property to a theatrical company for the purpose of their holding theatrical performances thereon, at a time when no crops are growing on the holding—*Yusuf Ali v. Hira*, 20 All. 469.

586. Clause (p):—Permanent structures:—This clause prohibits the tenant from erecting any permanent structures on the land, but if he so erects, he is entitled to remove them according to the provisions of clause (h).

The prohibition under this clause does not apply when according to the contract of the parties the land is let for the erection of a dwelling house or a shop thereon—*Ismail v. Nazarali*, 27 Mad. 211 (216).

If a tenant builds a house on the land for agricultural purposes, with the landlord's consent, he is not entitled to sell or mortgage the house so as to pass any right in the *site* thereof. His right to occupy the site is merely personal, and his power to sell or mortgage extends only to the materials out of which the house is constructed—*Chhaju Singh v. Kanhai*, 1881 A.W.N. 114 (F.B.); *Amir Begam v. Balak*, 1900 A.W.N. 182; *Sri Girdhariji v. Chote Lal*, 20 All. 248.

587. Clause (q):—Lessee's duty to restore possession on expiry of term:—The tenant giving up the demised lands to his landlord on the expiry of the term is bound to give him *vacant* possession—*Balaramgiri v. Vasudev*, 22 Bom. 348. This rule applies not only where the tenant gives up possession on the expiry of the term, but also where the tenant treats the lease as void on account of destruction of the premises by fire—*Bruehl & Co. v. Haji Siddick*, 12 Bom.L.R. 474, 6 I.C. 909. If the tenant does not give vacant possession to the landlord, its effect is not to continue the tenancy indefinitely but to give rise to a claim for damages on the part of the landlord. The tenant is liable in damages to the extent of the loss of rent which the landlord sustains during the actual period for which he was kept out of possession and the expenses he was put to in recovering possession of the land—*Balaramgiri v. Vasudev*, 22 Bom. 348. A landlord is entitled to claim damages against a tenant who holds over, either for breach of his contract to yield up peaceful possession or for trespass—*Sundarmall v. Ladharam*, 50 Cal. 667; *Robinson v. Learoyd*, (1840) 7 M. & W. 48. If the property is in the possession of a sub-lessee, it is the duty of the lessee to get him out, otherwise he cannot give the landlord complete possession. If the lessee does not turn him out, the landlord may maintain a suit for ejectment against the sub-lessee and recover damages from the lessee including the cost of ejecting the sub-lessee—*Henderson v. Squire*, 1 L.R. 4 Q.B. 170.

If the tenant had encroached upon any land and made it a part of his tenancy, he is bound, after the determination of tenancy, to give up those lands to his landlord—*Indu Bhushan v. Atul Chandra*, 42 C.L.J. 276, A.I.R. 1925 Cal. 1114 (1116), 87 I.C. 630.

The tenant is bound to preserve the boundaries of the lands he holds and not to permit them to be confounded with the boundaries of other lands belonging to himself, so that he may be able to deliver up, after the expiry of the term, his landlord's land distinct and unintermixed with any other land—*Attorney-General v. Fullerton*, 2 V. & B. 264; *Dugappa v. Tirthasami*, 6 Mad. 263. If, owing to his negligence, the land demised is confounded with other lands, he is bound to compensate his landlord by making over to him a part of the property with which it was mixed up, equal to its annual value—*Dugappa v. Tirthasami*, 6 Mad. 263; *Ismail Khan v. Broughton*, 5 C.W.N. 846.

Covenant for Renewal:—A covenant for renewal of lease of land is a covenant running with the land, and consequently the assignee of the leasehold is perfectly competent to enforce its terms—*Nabakishore v. Madan Mohan*, A.I.R. 1924 Cal. 346, 69 I.C. 600; *Secretary of State v. Forbes*, 16 C.L.J. 217, 17 I.C. 180. The covenant is enforceable not only against the lessor but also against the lessor's transferee with notice of the lease—*Onkar Prasad v. Badri Das*, 23 N.L.R. 26, 89 I.C. 273, A.I.R. 1925 Nag. 281.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Rights of lessor's transferee.

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Principle:—The latter portion of the first para which lays down that the lessor shall not, by reason of transfer of his interest, cease to be subject to the liabilities unless the lessee elects to treat the transferee as his landlord, is an illustration of the equitable principle that "a man cannot assign obligations (*i.e.*, cannot substitute some one else as the performer

of his duties), without the consent or the authority of those to whom the duties are owing"—*per Innes, J.*, in *Cheru Komen v. Govenden*, 6 M.H.C.R. 145 (at p. 151).

588. "Transfer":—The word 'transfer' includes a lease, *i.e.*, a lessee of the lessor is entitled to all the rights enumerated in this section and can therefore eject a monthly tenant put in by the original lessor—*Parbhu Ram v. Tek Chand*, 1 Lah. 241, 53 I.C. 865.

Effect of transfer:—The purchaser of the rights of the lessor has *all the rights* of the lessor under the lease unless there is some express stipulation to the contrary—*Narayan Das v. Parasram*, 4 C.P.L.R. 61. Under the previous law the transferee could not sue the lessee for rent unless the latter had previously attorned to him—*Ram Lal v. Chandrabulle*, 13 W.R. 228. But under the present law an attornment is no longer necessary.

The transferee is entitled to take advantage of the forfeiture clause under section 110 (g)—*Vishveshwar v. Mahableshwar*, 43 Bom. 28 (37), 47 I.C. 330. See this case fully cited in Note 48 under sec. 6. The transferee of the lessor is entitled to eject the tenants put in by the original lessor, and it is not necessary for the original lessor to inform the tenants that he has transferred the house to the transferee—*Parbhu Ram v. Tek Chand*, 1 Lah. 241, 53 I.C. 865.

The assignee is also subject to *all the liabilities* of the lessor. Thus, a covenant to renew a lease is a covenant which runs with the land, and which according to this section creates a liability enforceable against the lessor's transferee—*Ramasami v. Chinnan*, 24 Mad. 449.

589. Para 2:—The transferee is not entitled to arrears of rent accrued due before the transfer; nor is he entitled to rents accruing due after the transfer, if the lessee had, without notice of the transfer, already paid such rent to the original lessor. Although the title of the assignee of the lease is complete upon execution and registration of the deed of assignment, and is not postponed till notice has been given to the tenant, still the tenant is not bound to pay rent to him until he gets notice of the assignment. The tenant is thus able to escape the liability to the assignee if he alleges and establishes that he has paid rent to the assignor in good faith before he had notice of the assignment—*Peary Lal v. Madhoji*, 17 C.L.J. 372, 19 I.C. 865. But the lessee becomes liable to the assignee as soon as he has notice of the assignment—*Raisuddin v. Khodu*, 12 C.P.L.R. 479. Therefore, if the tenant pays rent to the assignee after he receives notice of the transfer, the payment is of no avail—*Peary Lal v. Madhoji*, 17 C.L.J. 372, 19 I.C. 865. So also, if the lessee surrenders his holding on the expiry of the term to the original lessor after the transfer, and there is nothing to show that he had no notice of the assignment, the surrender is not valid and binding on the assignee who can claim rent from the lessee on the ground of his holding over after the expiry of the lease—*Rama Chandra v. Sheik Hussain*, 3 Bom.L.R. 679.

The mere fact that the notice of the transfer of the leased property was not given by the assignee to the tenant shall not lead the Court to assume that the tenant did not become the tenant of the assignee, and that the assignee was not entitled to recover any rent from the tenant. This section provides no penalty for want of notice except the loss of rent already paid by the lessee to the original lessor. That is, if the tenant does not receive any notice of the transfer and therefore pays rent to the original lessor, the assignee of the lessor cannot recover the rent from

the tenant twice over—*Bhola Nath v. Supper*, 72 I.C. 86, A.I.R. 1923 Lah. 389.

Where the tenant receives notice of the assignment, he is bound by it, and it is immaterial whether the notice is received from the assignor or from the assignee. The real question which the Court has to consider is whether the payment alleged to have been made by the tenant was made *bona fide*. If he has made the payment with notice, actual or constructive, of the assignment, he cannot be deemed to have paid in good faith and he cannot escape liability merely by proof that the notice received was from the assignee and not from the assignor—*Peary Lal v. Madhoji*, 17 C.L.J. 372, 19 I.C. 865 (868).

590. Transfer of portion of tenure:—A sale of a share in a tenure which has been let to a tenant in its entirety, does not of itself necessarily effect a severance of the tenure or an apportionment of the rent; but if the purchaser of the share desires to have such a severance or apportionment, he is entitled to enforce it by taking proper steps for that purpose. In such a case, he must give the tenant due notice to that effect, and then if an apportionment of the rent cannot be made by amicable arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit—*Ishwar Chandra v. Ramkrishna*, 5 Cal. 902. And the apportionment may take place in respect of the arrears of rent alleged due as well as the future rent—*Rajnarain v. Ekadasi*, 27 Cal. 479.

When a lessor sells a portion of his property, the rule of sec. 37 will be applied, and the tenants will be bound to pay to each of the owners his proportionate share of the rent. They are not bound to perform the various obligations imposed on them as lessees, wholly in favour of either the lessor or his transferee, if such obligation is capable of severance and such performance will not be to their prejudice. They are also bound, on the determination of the tenancy to put the lessor in possession of only so much of the property as he has not transferred. The rent payable and the property to be surrendered, unless all the parties agree, can only be ascertained in a suit to which all the lessors and the lessees are parties—*Sri Raja Simhadri v. Prattipati Ramayya*, 29 Mad. 29 (36).

Under this section, it is not competent to an assignee of a part of the demised premises to eject the tenant from that portion compulsorily during the period of tenancy—*Kannyan Baduran v. Alikutti*, 42 Mad. 603 (612) (F.B.). 51 I.C. 286.

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Exclusion of day on which term commences.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Duration of lease for a year.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Option to determine lease.

591. Application of section:—The first sentence of this section may be compared with section 12 (1) of the Limitation Act which lays down that “in computing the period of limitation, the day from which such period is to be computed shall be excluded.” Compare also sec. 9 (a) of the General Clauses Act which enacts that wherever the word ‘from’ is used, the first in a series of days or any other period of time should be excluded.

A tenancy for a term of 4 years which is said to commence from the 1st June 1921 must be deemed to have commenced on the 2nd June 1921 and ended on the midnight of the 1st June 1925. Thereafter, if the tenant held over as a monthly tenant, a notice given by the tenant on 1st February 1928 intending to vacate on the midnight of the 1st March 1928 was a valid notice—*Benoy Krishna v. Salciccioni*, 60 Cal. 389 (P.C.), 37 C.W.N. 1 (3), A.I.R. 1932 P.C. 279, 141 I.C. 514. A monthly tenancy commencing from the 1st December 1924 must be deemed to commence on the 2nd December and end on the midnight of the 1st January 1925, but if the parties stipulate that on the expiry of the monthly tenancy, the lease shall continue according to *calendar* months, it must be taken that after 1st January 1925, the lease shall continue for January (i.e., 1st to 31st January), February (i.e., 1st to 28th February), and so on; and the notice must be given accordingly. Therefore a notice to quit given on 15th September must call upon the tenant to vacate on the midnight of the 30th September and not on the 1st October—*Gnanaprakasam v. Vaz*, 60 M.L.J. 293, A.I.R. 1931 Mad. 352 (353).

The rule in this section applies not only in computing the time for the duration of a lease but also in computing the time from which a notice to quit commences; so that the day on which the notice is given is excluded from calculation. Thus where the landlord served a notice on the tenant on the 16th of a month, requiring him to quit the land on the 30th of the same month, *held* that the day on which the notice was served (i.e., the 16th) was to be excluded, and the tenant had therefore only 14 days’ notice, which was invalid—*Subadini v. Durga Charan*, 28 Cal. 118.

Where there is no express stipulation for the commencement of a lease, the parties must be taken to have intended that the lease would take effect from the date of the execution of the instrument—*Kailas Chandra v. Bijoy*, 23 C.W.N. 190, 50 I.C. 177. Unless it could be definitely shown that the tenancy was to commence at a particular date different from the date of the document by which it was created, it must be held ordinarily that the year of the tenancy commences from the date of the document. Thus, if the document of lease is dated 5th Aswin 1307 B. S., and there is nothing to show that the parties contemplated that the year of the tenancy would commence from any other date, it must be held that the tenancy commenced from 5th Aswin 1307 B.S.—*Dinanath v. Janaki Nath*, 55 Cal. 435, A.I.R. 1928 Cal. 392 (396), 110 I.C. 368.

The agreement referred to in the 2nd para must be an express agreement. If a lease for a term of 4 years is said to commence on the 1st day of June 1921, the term will be calculated from the 2nd June 1921 and will expire on the midnight of the 1st June 1925. The fact that the rent is payable monthly and that each month's rent is payable on the 7th of the next month is merely an agreement providing for the payment of the rent; it does not amount to an inconsistency between the provision with regard to the payment of rent and the provision with regard to the length of the term, and does not lead to an inference of an "agreement to the contrary," excluding the operation of this section, so as to treat the lease as commencing on the 1st day of June 1921 and ending on the 31st May 1925—*Binoy Krishna v. Salciccioni*, *supra*.

Para. 3:—The third para lays down a rule of construction to be applied in case of doubt or ambiguity. If the term of the lease is explicit and clear, as for instance, where the lease is expressly made terminable at the option of the lessor, it will be so terminable, and no other person will have that option. It is only where the language of the lease is doubtful that it is to be deemed as terminable at the option of the grantee.

111. A lease of immoveable property
Determination of lease. determines—

- (a) by efflux of the time limited thereby;
- (b) where such time is limited conditionally on the happening of some event—by the happening of such event;
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event;
- (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;
- (e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor by mutual agreement between them;
- (f) by implied surrender;
- (g) by forfeiture, that is to say—(1) in case the lessee breaks an express condition which provides that, on breach thereof the lessor may re-enter * * * ; or (2) in case the lessee renounces his character as such by setting up a title in a third person, or by claiming title in himself; or (3) *the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event*; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;
- (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to Clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease and such lease determines thereupon.

Amendment:—Clause (g) has been amended by sec. 57 of the T. P. Amendment Act (XX of 1929). See Notes 597, 599A and 600 below.

The principles of this section will apply to the Panjab, although the Act does not *proprio vigore* apply to that province—*Chiragh Din v. Mahomed Usman Khan*, 70 I.C. 349 (Lah.).

592. Agricultural leases:—Although agricultural leases have been excluded from the purview of this Act by the express prohibition contained in sec. 117, and therefore section 111 cannot apply in terms to such leases, still the principles of equity as embodied in this section will be applied to agricultural leases. Therefore, where a mulgeni lease provided for previous notice to the lessor in case of an intended sale or mortgage of the leasehold interest by the lessee and for forfeiture of lease and re-entry on breach of the covenant, *held* that the lease would be forfeited and the lessor would be entitled to possession on breach of the covenant, on the application of the principle embodied in clause (g) of this section—*Krishna Shetti v. Gilbert Pinto*, 42 Mad. 654. Similarly, an agricultural tenant will forfeit his tenancy under clause (g) by setting up a title in a third person or by claiming title in himself—*Kemalooti v. Muhamed*, 41 Mad. 629 (630).

593. Clause (a)—Expiry of term:—Under this clause, a lease comes to an end upon the expiry of the term for which it was granted. But if there is a covenant for renewal, the lessee may claim enforcement of such covenant. But in order to be enforceable, such covenant must be definite as to the terms upon which the renewal is to be granted. Where a lease for a term of nine years provided that at the expiry of the term the tenant might apply for re-settlement, in which case the landlord would grant him a re-settlement without any bonus, *held* that the above covenant did not specify any terms as to the amount of rent to be paid by the tenant, and was too vague to be given effect to, and the landlord was entitled to eject the tenant at the end of the term—*Surendra v. Dinabandhu*, 13 C.W.N. 595, 4 I.C. 535. A covenant for renewal may direct the lessee to exercise his option within a certain time and may provide for the giving of a notice, in which case it would be the duty of the lessee to give notice and obtain renewal within that time. But where the covenant for renewal was in the following terms: "After the expiration of the said term, if the lessee shall so desire, the executant shall have no objection whatever to renew the lease for a further term of twenty years on the terms and in consideration of payment of the rent mentioned in the lease" and there was nothing in the lease to indicate that notice of the intention to renew was to be given by the lessee before its expiration, it was held that the lessee had not forfeited his right to have the lease renewed by reason of having allowed some months to elapse after the expiration of the original term before he gave notice to the lessor of his intention to take advantage of the covenant for renewal—*Jaggilal v. Cooper*, 27 All. 696.

Since a lease does not terminate until the expiry of the term,

a suit for ejectment and possession before the expiry of the period is premature; but the suit need not necessarily be dismissed, for although it is not maintainable so far as it relates to the claim for immediate possession, the landlord is entitled to a declaration of his right—*Ghulam Hussain v. Mahomed Hussain*, 6 A.L.J. 177, following *Sita Ram v. Ram Lal*, 18 All. 440. The Madras High Court holds that such a suit is not maintainable and must be dismissed, even though the lease expires during the pendency of the suit. The reason is that the rights of the parties must be determined as on the date of the action brought—*Ramanandan v. Pulikutti*, 21 Mad. 288.

593A. Clause (b):—If the term of the lease is limited conditionally on the happening of some event, the lease is determined by the happening of such event. Thus, where the term is limited for thirty years if the lessee shall so long live, the lease is terminable at the end of thirty years or upon the death of the lessee, which event may first happen. See Woodfall's *Landlord and Tenant*, 16th Ed., p. 313.

593B. Clause (c):—If the lessor holds the property for his own life or for the life of another, the lease would terminate on the death of himself or of that other person. A lease granted by a Hindu widow would fall under this clause.

594. Clause (d)—Merger:—This clause is an embodiment of the maxim "*nemo potest esse tenens et dominus*" i.e., nobody can be both landlord and tenant at the same time (in respect of the same property). Thus, if a patnidar purchases the Zemindari rights in the mahal, his rights as patnidar would be merged—*Prosonno v. Jagut Chunder*, 3 C.L.R. 159. The principle of merger enunciated in this clause equally applies where the merger takes place by virtue of transfers by operation of law. Thus, a patni interest determines when the same is purchased by the Zemindar at an execution sale—*Promotho Nath v. Kali Prosonno*, 28 Cal. 744.

This clause can not apply to a lease granted *prior to* the passing of this Act, by virtue of sec. 2 (c). Therefore, where a mokarari lease was granted to a person prior to this Act, and he subsequently acquired a *putni* lease, this clause did not apply and there was no merger of the two interests—*Hirendranath v. Hari Mohan*, 18 C.W.N. 860 (865), 22 I.C. 966; *Dulhin Lachimbati v. Bodhnath Tewari*, 48 I.A. 485 (P.C.), 26 C.W.N. 565, 3 P.L.T. 383, 15 I.W. 343, 66 I.C. 551, A.I.R. 1922 P.C. 94. Similarly, where a *patni* interest was created prior to the passing of the T. P. Act, no merger could take place by reason of the *patni* interest coming into the same hands as the Zemindary interest—*Jibanti Nath v. Gokool Chunder*, 19 Cal. 760.

So also, in cases not governed by the provisions of this Act, the union of a superior and a subordinate interest does not necessarily merge the subordinate in the superior interest. The question in such cases is one of intention, and the conduct of the party concerned may show that he did not intend to keep the two interests alive as mutually *distinct* rights—*Ram Krishen v. Haripada*, 23 C.W.N. 830, 51 I.C. 389, 29 C.L.J. 427. On the other hand, if the two interests (e.g., mokarari and *patni* leases) held by a joint family in the same land were in the names of different members, that would be a material circumstance in showing that the intention was to keep the interests distinct—*Dulhin Lachimbati v. Bodh-*

Nath, 48 I.A. 485 (P.C.), 26 C.W.N. 565, 3 P.L.T. 383. Where a moka-rari tenure had all along been treated as a distinct sub-tenure, there was no merger by acquisition of a patni tenure and the moka-rari tenure by the same person—*Hirendra v. Hari Mohan*, 18 C.W.N. 860 (864), 22 I.C. 966.

The principle of merger implies the union of two *unequal* interests at the same time and in the same right; that is, in order that there may be a merger it is essential that there should be a greater and a less estate—*Ulfat Hossain v. Gayani Das*, 36 Cal. 802; *Surja Narayan v. Nanda Lal*, 33 Cal. 1212; *Hirendra v. Hari Mohan*, 18 C.W.N. 860 (862), 22 I.C. 966. Thus, where the proprietor purchases the inferior right of his lessee, the transaction comes directly within the four corners of this clause, and the inferior interest merges in that of the superior interest—*Hriday Narain v. Kali Charan*, A.I.R. 1928 Pat. 273, 107 I.C. 819. But, if the lessee of a holding takes a usufructuary mortgage of the holding from his landlord, the lease is not merged in the mortgage, because the two interests are co-ordinate, and not inconsistent or incompatible—*Lord Dynevor v. Tenant*, 13 App. Cas. 279; *Kashi v. Durga*, 7 N.L.R. 154, 12 I.C. 734. In such a case, the tenant would not lose his possession as tenant, after his possession as mortgagee has ceased. The tenant's rights would only be in abeyance and the rent suspended during the term of the mortgage, but as soon as the landlord redeems the mortgage, the parties would revert to their former status, and the landlord would not be able to get possession except by ejecting the tenant in due course of law—*Kalu v. Diwan*, 24 All. 487; *Kashi v. Durga*, 7 N.L.R. 154, 12 I.C. 734. So also, if a person who held a malguzari tenure directly under the 16 annas Zemindar, afterwards took a moka-rari lease from the *patnidar* under 8 annas maliks, the malguzari interest did not merge in the moka-rari—*Amattoo v. Sheikh Mukshud Ali*, 19 C.W.N. 435, 28 I.C. 314.

Another requisite of merger is that the *entire* interest of the lessee and the entire interest of the lessor must vest in the same person—*Mon-matha v. Mohendra*, 65 I.C. 469, A.I.R. 1922 Cal. 284 (285); *Lala Nathuni Prosad v. Anwar Karim*, 53 I.C. 16 (Pat.). See also 19 C.W.N. 435 cited above. If a lessee of a portion of the property acquires a fractional share of the proprietary interest in the property, there is no merger of his tenancy right in his proprietary right so as to extinguish his lease—*Faqir Bakhsh v. Murli Dhar*, 6 Luck. 197 (P.C.), 35 C.W.N. 502 (505), A.I.R. 1931 P.C. 63, 131 I.C. 334. Where a co-proprietor, who had merely one-anna share in the property, purchased for himself the interests of the lessees of the whole property, there could be no merger—*Parmeshwar v. Sureba*, 6 P.L.T. 805, A.I.R. 1925 Pat. 530, 88 I.C. 495.

595. Clause (e)—Surrender:—This clause applies only to leases which can be surrendered; where a lease is entered into for a definite term, and there is a covenant in it expressly forbidding surrender by the tenant before the expiry of the term, this clause has no application—*Jatindra Mohan v. Emam Ali*, 9 C.L.J. 632.

A formal deed of reconveyance is not necessary to effect a valid surrender—*Imambandi v. Kamaleswari*, 14 Cal. 109 (119) (P.C.). Nor is any particular form of words essential to make a good surrender. The question is one of intention. Thus, when the lessee executed a *razinama* in the following terms: "Up to the present time I have been

cultivating the land, but the land belongs to the *inamdar*. I have no title to it, and the *inamdar* can give it for cultivation to any one he pleases," it was held that a valid surrender was made—*Bhutia v. Ambo*, 13 Bom. 294. But mere non-payment of rent for several years does not amount to surrender, in the absence of an intention to yield up—*Obhoya v. Kailash*, 14 Cad. 751; *Prem Sukh v. Bhupia*, 2 All. 517 (F.B.).

There can be no valid surrender unless the surrender takes place by mutual agreement between the lessor and the lessee. Therefore the lessee cannot make a valid surrender by merely giving notice to his landlord that he is going to relinquish the land, and the mere fact that the landlord silently receives the notice, which the lessee has no legal right to give, cannot be regarded as an assent to the relinquishment—*Judoonath v. Scheone, Kilburn & Co.*, 9 Cal. 671. If the lessor has mortgaged the land as well as the right to recover the rent, the lessee cannot make a surrender of his lease in favour of the lessor, because it was not competent to the lessor to accept the surrender without the concurrence of the mortgagee. The right to agree to the surrender of the lease did not remain in the lessor-mortgagor but passed to the mortgagee, and without the latter's consent the surrender was not valid. Consequently the lessee remained liable to pay rent to the mortgagee—*Havu v. Ganapati*, 32 Bom. L.R. 679, 125 I.C. 689, A.I.R. 1930 Bom. 329 (330).

596. Clause (f)—Implied surrender:—If a lessee accepts from his lessor a new lease of the property leased, in substitution of the existing lease, it operates as a surrender of the original lease. See Illustration; also, *Crowley v. Vitty*, L.R. 7 Exch. 319. But a mere alteration of the terms of the tenancy, namely the rent reserved under the lease, is not equivalent to an implied surrender of the lease—*Jamini Mohan v. Debendra*, 71 I.C. 976, A.I.R. 1924 Cal. 355. It is not necessary that in order to operate as a surrender, the new lease should be of the same duration as the existing lease. If a lessee for twenty years takes a new lease for ten years, the old lease is deemed to be surrendered.

To constitute an implied surrender it is necessary that the new lease should be a valid one. Where the new lease is void or voidable or does not pass an interest according to the contract, the acceptance of it does not operate as a surrender of the original lease—*Jamini Mohan v. Debendra*, supra.

The subsequent grant of a mining lease to a lessee who held a prior lease for coffee cultivation over the same area does not necessarily imply a surrender of the prior lease. It is only in cases where there is some incompatibility between the enjoyment under the new lease and the enjoyment under the prior lease that the acceptance of the second lease will involve a surrender of the first. Even where the leases are of the same kind and they are overlapping, and the terms of the second are somewhat inconsistent with the terms of the first, all that can be implied is a cancellation of the first, only for a period which is overlapped by the second—*Manavendan Tirumalpad v. Parry & Co.*, 48 Mad. 815, A.I.R. 1925 Mad. 1277 (1278), 49 M.L.J. 390, 90 I.C. 729.

Clause (g)—Forfeiture:—The following amendments have been made in this clause: the words "or the lease shall become void" have been omitted from sub-clause (1); sub-clause (3) has been newly added; and the words "gives notice in writing to the lessee of" have been sub-

stituted for the words "does some act showing." The reasons are stated in Notes 597, 599A and 600 below.

597. Breach of express condition:—This section contains no clause providing for the termination of the lease at the option of the *lessee* on account of a breach of a term of the contract, nor is there anything in section 108 to enable the lessee to avoid the lease. The lessee is not entitled to put an end to the lease for breach of a covenant in the lease, but he can only claim damages for such breach, if any—*Govindswami v. Palaniappa*, 48 M.L.J. 397, A.I.R. 1925 Mad. 833, 87 I.C. 10.

What is meant by an "express" condition is, not that the wording of it should be in any particular form, but that the condition can be gathered from the words of the instrument, giving to them their ordinary meaning. If a clause in a lease is so expressed that it can only be read as reserving the right of forfeiture of the landlord in certain circumstances, that is a sufficiently 'express' condition—*Mussa Kutti v. Rangachariar*, 8 M.L.T. 238, 8 I.C. 309. Thus, where the lease contained an express provision for re-entry on "breach of any of the conditions of the lease" and the tenant failed to pay rent, *held* that as the payment of rent was one of the conditions on breach of which the landlord was entitled to re-enter, the non-payment of rent operated as forfeiture of the lease—*Ibid*.

In case of a service tenure, the discontinuance of services by the lessee does not amount to a forfeiture of the lease, where modern conditions make the services highly burdensome to the lessee without any corresponding benefit to the lessor, and where it is doubtful whether a strict compliance with the provisions of the patta relating to services would not be of public inconvenience—*Maharaja of Jeypore v. Rukmini*, 42 Mad. 589 (601) (P.C.).

In order to entitle the landlord to treat the lease as forfeited it is necessary that the lease should contain an express provision that on breach of such and such condition, *the landlord would be entitled to re-enter*. Unless there is an express provision for *re-entry* for breach of any covenant in it, the lessor will not be entitled to treat the lease as forfeited and to eject the tenant—*Kishori Mohun v. Nund Kumar*, 24 Cal. 720 (724). Thus, where the lease merely contained a covenant on the part of the lessee not to alienate the property, but there was no provision for re-entry by the lessor in the event of such alienation, *held* that an alienation by the lessee in breach of such a covenant would not entitle the landlord to consider the lease as forfeited or to treat the alienation as void and to sue the tenant in ejectment. The relief of the landlord would be by way of damages for breach of the covenant against alienation—*Narayan v. Ali Saiba*, 18 Bom. 603; *Madar Buksh v. Sannabawa*, 21 Bom. 195; *Timapa v. Timaya*, 7 Bom. 262 (265); *Udipi v. Seshamma*, 43 Mad. 503, 61 I.C. 658; *Parmeshri v. Vittappa*, 26 Mad. 157; *Nilmadhab v. Narotam*, 17 Cal. 826; *Mahananda v. Saratmani*, 14 C.L.J. 585; *Basarat v. Manirulla*, 36 Cal. 745; *Netrapal v. Kallyan*, 28 All. 400; *Shanker Dayal v. Vinayak*, A.I.R. 1924 Oudh 305 (306), 79 I.C. 695, 27 O.C. 1. See note 92 under sec. 10. So also, in the absence of an express condition as regards forfeiture, a lease cannot come to an end merely because the lease-money is not paid by the lessee—*Mahadoo v. Jainarayan*, 62 I.C. 850. Similarly, where there was a stipulation in the lease against subletting but the lease contained no stipulation giving a right of re-entry to the lessor upon subletting by the lessee, *held* that

the mere prohibition against sub-letting was in the nature of a threat, and in the absence of a provision for re-entry, the tenant could not be ejected on the ground of subletting—*Gordon Stuart & Co. v. Taylors*, W.R. (F.B.) 9; *Sital Prosad v. Dildar Ali*, 1 P.L.J. 1, 33 I.C. 408.

The forfeiture clause in the lease-deed would be very strictly construed. So, where the lease contained a provision that an alienation of the tenure by the lessee without the lessor's consent would entitle the landlord to re-enter as upon a forfeiture, the sale of a *portion thereof* by one of the joint tenants would not work as a forfeiture of the whole tenure; the others will continue in possession as before—*Kundan v. Kallu*, 12 A.L.J. 650, 24 I.C. 79; *Dassorathy v. Rama Krishna*, 9 Cal. 526. A covenant against alienation does not prevent the tenant from assigning a portion of the premises, and unless the covenant is expressly worded to exclude a partial alienation of the premises, such partial alienation will not work as a forfeiture—*Grove v. Portel*, [1905] 1 Ch. 727; *Venkata-ramana v. Krishna*, 47 M.L.J. 307, A.I.R. 1925 Mad. 57, 81 I.C. 1006. Where the terms of a lease provided that the lessee was entitled to underlet but not to "assign" his right in any way, and then the lessee mortgaged the said lease by way of subdemise, *held* that the word 'assign' meant 'part with *absolutely*', i.e., the parties intended and agreed that the lessee should be entitled to part with possession of the land and premises by way of sub-demise or otherwise, so long as he did not *absolutely* transfer the whole of his right, title and interest therein; consequently the *mortgage* did not operate as a forfeiture of the lease—per Page, J., in *Bejoy Lal v. Benarasidas*, 54 Cal. 948, 110 I.C. 296, A.I.R. 1928 Cal. 99 (101). And this view has been affirmed by the Privy Council in *Hunsraj v. Bejoy Lal*, 57 Cal. 1176, 34 C.W.N. 342 (347), 122 I.C. 20, A.I.R. 1930 P.C. 59, reversing the judgment of the Division Bench in *Bejoy Lal v. Benarasidas*, 32 C.W.N. 353, A.I.R. 1928 Cal. 681, 114 I.C. 786. By creating the mortgage, the lessee has merely deposited the lease as a security, which it was competent for him to do so. There is no parting with the interest absolutely, because the lessee might at any time redeem the indenture by paying off the incumbrance upon it—*Doe v. Hogg*, (1824) 4 Dow. & Ry. 226.

Where a lease stipulates for forfeiture in case of alienation by the lessee, it means a covenant against *voluntary* alienation, and the lease cannot be forfeited where the land is sold against the will of the lessee by the act of a Court, *e.g.*, in execution of a decree—*Nilmadhab v. Narottam*, 17 Cal. 826; *Tamaya v. Timapa*, 7 Bom. 262 (265); *Subbaraya v. Krishna*, 6 Mad. 159. But where the lease contained a covenant that "the lessee is not to let the land be sold or attached and sold in *satisfaction of judgment-debts*, and that if he does so, the lessor will take away the land and give it to others," and the tenant allowed the land to be attached and sold, by not taking measures to satisfy his judgment-debts, *held* that there was a breach of the clause in the lease, which gave the lessor a right of re-entry—*Vyankatraya v. Shivrambhat*, 7 Bom. 256 (262).

The forfeiture clause in the lease enures not only for the benefit of the lessor but also of his representatives and assigns. Thus, where a lease contained a covenant reserving to the lessor a power of re-entry, on default of payment of rent, and there was no mention in such covenant of a similar power being also reserved to the lessor's "heirs, successors or

assigns", and the lessee sold his rights in the leased property to third persons, it was held that although re-entry was reserved only to the lessor, yet the vendees of the lessor could take advantage of the covenant—*Kristo Nath v. Brown*, 14 Cal. 176; *Vishveshwar v. Mahableshwar*, 43 Bom. 28 (31), 47 I.C. 330.

"Or the lease shall become void":—These words occurring in the old clause (g) have now been omitted for the following reasons:—

"Clause (g) of section 111 relates to the determination of a lease by forfeiture and provides for two cases in which forfeiture can be enforced. Under sub-head (1) forfeiture can be enforced—(a) if the lessee breaks an express condition in a lease which provides that on its breach the lessor may re-enter, and (b) if the lessee breaks an express condition on the breach of which the lease shall become void. The provision under (b) is not in accordance with the well-established principle of English law that a lessee cannot re-enter on the breach of any condition in a lease unless there is an express stipulation to that effect. The same view has been followed in India (L.L.R. 17 Cal. 826). The words in clause (g) 'or the lease shall become void' should therefore be omitted."—*Report of the Special Committee*.

598. Denial of landlord's title:—A tenant who denies his landlord's title renders the lease liable to forfeiture, notwithstanding that the lease is permanent—*Kally Das v. Monmohini*, 24 Cal. 440; *Abhiram Goswami v. Shyama Charan*, 36 Cal. 1003 (P.C.); *Ananda v. Abraham*, 4 C.W.N. 42; *Mela Ram v. Sandhi*, 13 Lah. 796, 141 I.C. 825, A.I.R. 1933 Lah. 221. This is an application of the general principle of law that a man cannot blow hot and cold, i.e., cannot both approbate and reprobate.

In order to work a forfeiture, the denial must be unequivocal, and some act tending to the giving up of the relationship of landlord and tenant must have been committed—*Prag Narain v. Kadir Bakhsh*, 35 All. 145, 18 I.C. 728. The test to apply would be, whether the assertion would operate as a starting point for adverse possession against the landlord—*Doe v. Williams*, (1777) 2 Cowp. 622; *Kemalooti v. Muhamed*, 41 Mad. 629 (636). Under this clause, there is a denial of title when "the lessee renounces his character as such, by setting up a title in a third person or by claiming title in himself." The word "renounce" connotes that some act is done to the knowledge of the landlord which is calculated to convey to him the impression that the tenant repudiated his title. Where the tenant disclaimed the landlord's title and asserted his own by an incidental and casual statement made in a document executed by him to a third party purporting to convey some property other than that to which the assertion related, but the assertion was not addressed to the landlord nor was followed up by transferring the particular property to a third party, held that such a collateral reference as the one contained in the said document was not enough to constitute a disclaimer of the landlord's title justifying the forfeiture of the tenancy—*Kemalooti v. Muhamed*, 41 Mad. 629 (632, 636). Where the permanent tenants made a partition among themselves describing themselves as owners, and also passed several mortgages and sale-deeds in favour of strangers, in which also they described themselves as owners, but they never communicated to the landlord their desire to renounce the relationship of landlord and

tenant, it was held that this fact did not bring about a forfeiture of the tenancy—*Narayan v. Mangesh*, 34 Bom.L.R. 1287, 140 I.C. 567, A.I.R. 1932 Bom. 599 (601). The mere receipt and retention by the tenant of a document of sub-lease in which he is spoken of as the Jenmi of the lands demised, cannot operate as a denial of the landlord's title, when there was nothing to show that the tenant actually assumed the role of a Jenmi and the landlord was made aware of such assumption—*Raman Nair v. Mariyamma*, 43 Mad. 480. The law has been thus stated: "In order to make either a verbal or a written disclaimer sufficient, it must amount to a direct repudiation of the relationship of landlord and tenant, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it"—Woodfall's *Landlord and Tenant*, 19th Edn., p. 431; William's *Ejectment*, 2nd Edn., p. 56; *Doe d Gray v. Stanion*, (1836). 1 M. & W. 695 (703); *Vivian v. Moat*, (1881), 16 Ch.D. 730.

It is not necessary that the denial of landlord's title by the tenant should be accompanied by an *express assertion* that the title is either in the tenant or in some third person. If the landlord's title is denied, it involves the assertion that the title is either in the tenant or in some third person—*Padmanabhaya v. Ranga*, 34 Mad. 161 (163). If the tenant does not claim a right in himself but merely sets up a title in a third party as his landlord under whom he admits to be occupying the status of a tenant, (*i.e.*, where he does not *renounce the status of a tenant*), still it would amount to a denial of the title of the real landlord—*Hatimullah v. Md. Arju*, 32 C.W.N. 391 (396), A.I.R. 1928 Cal. 312, 113 I.C. 13.

A denial by the lessee of his lessor's title even by parol declarations entitles the landlord to exercise his option of determining the lease—*Satyabhama v. Krishna Chandra*, 6 Cal. 55; *Vishnu v. Balaji*, 12 Bom. 352.

The denial of landlord's title by the original lessee will not work as a forfeiture against the *assignee* of the lessee—*Gopal v. Shrinivas*, 42 Bom. 734.

The disclaimer of landlord's title which is relied on as a ground for ejecting the tenant must have been made *before* the suit in ejectment was instituted. A disclaimer contained in the written statement of the defendant (tenant) cannot be made the basis of a decree for ejectment in the suit—*Mallika v. Makhanlal*, 9 C.W.N. 928; *Pran Nath v. Madhu*, 13 Cal. 96; *Nizamuddin v. Mamtasuddin*, 28 Cal. 135; *Maharaja of Jeypore v. Rukmini*, 42 Mad. 589 (P.C.); *Pratap Narain v. Harihar*, 36 Cal. 927; *Vithu v. Dhondi*, 15 Bom. 407; *Subba v. Nagappa*, 12 Mad. 353; *Madavan v. Athi Nangiyar*, 15 Mad. 123; *Unhamma v. Vaikuntha*, 17 Mad. 218; *Peria v. Subrahmanian*, 31 Mad. 261; *Samundar v. Mukh Lal*, 37 I.C. 935 (Pat.); *Rajaram v. Vithal*, 6 N.I.R. 83, 6 I.C. 927; *Chiragh Din v. Mahomed Usman*, A.I.R. 1924 Lah. 281, 70 I.C. 349; *Mukat Singh v. Paras Ram*, A.I.R. 1924 All. 726, 79 I.C. 106.

But a denial of title in a suit for *rent* causes a forfeiture of the tenancy—*Mahomed v. Habibar Rahaman*, 45 I.C. 642 (Pat.). The denial of the landlord's title in a previous suit for rent, coupled with the setting up of a third party as the landlord, makes the lessee liable to have his tenancy forfeited—*Gopal Ram v. Dhakeswar*, 35 Cal. 807 (810).

Where in a suit for rent brought by the lessor against the lessee the latter denied the title of the lessor, and the suit was dismissed on the

ground that the relationship of landlord and tenant did not subsist between them, and the lessor then brought another suit to eject the lessee, *held* that it was not open to the lessee in the latter suit to set up the tenancy which he had denied in the previous suit, and that by repudiating his landlord's title in the previous suit he had rendered himself liable to ejectment—*Khatar Mistri v. Sadruddi*, 34 Cal. 922; *Nilmadhab v. Ananta*, 2 C.W.N. 755; *Fayj Dhali v. Aftabuddin*, 6 C.W.N. 575; *Mallika v. Makhanlal*, 9 C.W.N. 928; *Ramgati v. Pranhari*, 3 C.L.J. 201; *Sheik Miadhar v. Rajanikant*, 14 C.W.N. 339, 5 I.C. 708; *Ekbar v. Hara*, 15 C.W.N. 335, 13 C.L.J. 1, 8 I.C. 660.

599. What does not amount to denial of title:—A denial of the landlord's right to enhance the rent or the setting up of a permanent tenancy is not necessarily a disclaimer of his title as landlord—*Kali Krishna v. Golam Ali*, 13 Cal. 248; *Haidri Begum v. Nathu*, 17 All. 45; *Parshotam v. Dattatraya*, 10 Bom. 669; *Vithu v. Dhondi*, 15 Bom. 407; *Lalu Gagal v. Bai Motan*, 17 Bom. 631; *Dodhu v. Madhavrao*, 18 Bom. 110; *Venkaji v. Lakshman*, 20 Bom. 354 (F.B.); *Suba v. Nagappa*, 12 Mad. 353; *Unhamma v. Vaikunta*, 17 Mad. 218. The setting up of a *mulgeni* right by the tenant is not a disclaimer of the landlord's title; it only amounts to a denial of the particular kind of tenancy under which the tenant holds possession and the setting up of a different kind of tenancy, but it does not amount to a denial of *title* of the landlord—*Unhamma v. Vaikunta*, 17 Mad. 218. Similarly, an assertion by a tenant from year to year that he is a permanent tenant is not tantamount to a denial of the landlord's *title*—*Gol Daji v. Dod Laxman*, 22 Bom.L.R. 648, 58 I.C. 226.

Where after the death of the original lessor the tenant did not directly deny the claimant's title, but refused to pay rent until he knew who was the real owner, and it appeared that the succession was at that time disputed, it was held that there was no denial of the landlord's title—*Jones v. Mills*, 10 C.B. (N.S.) 788. Where the tenant denies the plaintiff's title to recover rent from him, *bona fide* for the purpose of seeing such title established in a Court of law in order to protect himself, he is not to be charged with disclaiming the plaintiff's title—*Hatimullah v. Mahamad Arju*, 32 C.W.N. 391 (395), A.I.R. 1928 Cal. 312, 113 I.C. 13. Similarly, there is no disclaimer of the relationship of landlord and tenant, where the tenant merely puts the landlord to the proof of his title by purchase—*Mallika v. Makhan Lal*, 9 C.W.N. 928; *Venkatachariar v. Rangaswami*, 36 M.L.J. 532, 51 I.C. 709. The denial by the tenant of the right of an *assignee* from the original lessor does not work a forfeiture of the tenancy. Where there was no specific denial of the title of the original lessor but the tenant merely denied the right of the *purchaser*, and set up the right of one of the heirs of the original lessor, *held* that this could not work as a forfeiture—*Abdulla v. Md. Muslim*, A.I.R. 1926 Cal. 1205, 96 I.C. 1056.

There is no denial of title where the tenant merely questions the *extent* of the landlord's interest and his title to receive the entire rent—*Mallika v. Makhan Lal*, 9 C.W.N. 928.

Where the tenants could not obtain possession of the whole area leased to them, and on reference to their lessors, got no satisfaction from them, and then took a lease of the portion, of which they could not get possession, from a stranger whom they found in possession, *held* that

there was no renunciation by the tenants of their character as such so as to entail a forfeiture—*Farman Bibi v. Shaik Tasha*, 12 C.W.N. 587. Where the tenants did not repudiate their lease but rather stuck to it and only questioned the right of the plaintiffs as transferees from their lessor, the alleged transfer appearing to be of a date prior to the lease, *held* that there was no denial of landlord's title so as to cause a forfeiture of the tenancy—*Farman Bibi v. Shaik Tasha*, 12 C.W.N. 587. Where the land leased was acquired by the Government, and in the Land Acquisition case the pleader for the tenant described the latter as the owner of the land acquired, but throughout the proceedings the tenant never referred to himself otherwise than as tenant, *held* that the expression used by the *pleader* did not amount to a renunciation by the client of his character of a tenant. The Court must consider the intention of the tenant and his intention must be gathered from the attitude he himself adopted throughout the proceedings rather than from the formal grounds framed by his counsel—*Zia-uddin v. Fakhruddin*, 4 Lah. 160, A.I.R. 1923 Lah. 454, 73 I.C. 791.

599A. Lessee becoming insolvent:—Sub-clause (3) has been newly added for the following reasons:—

“Section 111, as it stands, does not provide for the case of forfeiture by reason of the adjudication of the lessee as insolvent. It is provided by section 12 *inter alia* that where property is transferred subject to a condition making any interest therein reserved or given to or for the benefit of any person, to cease on his becoming insolvent, such condition is void. At the same time it is provided in the second paragraph of the section that nothing therein contained applies to a condition in a lease for the benefit of the lessor or those claiming under him. The result is that if a lease contains a condition that on the lessee becoming insolvent the lease shall determine, the condition is valid. Such a condition would not, however, operate as a determination of the lease or have the effect of forfeiture under section 111 as it now stands. It is, therefore, desirable to make express provision that if the lessee is adjudicated an insolvent and the lease provides that a lessor may re-enter on the happening of that event, the lease is determined by forfeiture.”—*Report of the Special Committee*.

600. Notice of intention to determine lease:—Although forfeiture may be incurred by reason of a breach of condition or of denial of the landlord's title, still the landlord cannot enforce the forfeiture clause unless he “*gives notice to the lessee of his intention to determine the lease*.” These words have been substituted for the words “does some act showing his intention to determine the lease.” The words in the old clause left it uncertain as to what act the lessor should do showing his intention to determine the lease. It was held in some cases that the mere filing of a suit for ejectment by the landlord did not amount to doing some act showing the intention of the landlord to determine the tenancy—*Prag Narain v. Kadir Baksh*, 35 All. 145, 18 I.C. 728; *Matilal v. Chandra Kumar*, 24 C.W.N. 1064, 60 I.C. 312; *Nowrang v. Janardan*, 45 Cal. 469, 41 I.C. 952; *Padmanabhaya v. Ranga*, 34 Mad. 161 (164), 6 I.C. 447; *Shib Charan v. Kharka*, 47 All. 348, A.I.R. 1925 All. 346, 86 I.C. 174; *Kadir Baksh v. Prag Narain*, 9 A.L.J. 794, 14 I.C. 747; *Anandamoyi v. Lakhi Chandra*, 33 Cal. 339. The Bombay High Court however held in *Isabali v. Mahadu*, 42 Bom. 195, 43 I.C. 851 (followed in *Prokash*

v. Rajendra, 58 Cal. 1359, 35 C.W.N. 823, at p. 828), that the institution of a suit for ejectment was a sufficient manifestation of such an intention. It was also held that the act showing intention to determine the lease need not be a formal notice to quit, and may be a demand for possession, oral or written—*Naurang v. Janardan*, supra. In a Madras case, a lawyer's notice was held to be sufficient—*Sivarama v. Alagappa*, 1915 M.W.N. 845, 31 I.C. 211. So also the withdrawal of an ejectment suit with liberty to institute a fresh suit on the same cause of action—*Ramnath v. Sibasundari*, 25 C.L.J. 332, 40 I.C. 348; *Mazoor v. Padia-purayil*, 8 M.L.T. 99, 6 I.C. 264; or the lessor's act of taking possession of the leased premises was held to be an act showing an intention to determine the lease—*Cook & Co. v. Phillips*, 34 C.W.N. 785 (788), 130 I.C. 222, A.I.R. 1931 Cal. 133.

This uncertainty has now been set at rest, and the doubt as to the nature of the act which the lessor must do has been removed by requiring the lessor to *give notice in writing* of his intention to determine the lease, and this notice should be given before a right to institute a suit can arise.

In the absence of any such act on the part of the landlord, a mere denial of the landlord's title by the tenant does not entail forfeiture—*Ramasami v. Thayammal*, 26 Mad. 488. So also, the failure by the tenant to renew a lease for a term in compliance with the provision for renewal contained therein, does not operate as a forfeiture relieving the tenant from liability to pay rent, unless the lessor does some act showing his intention to determine the lease—*Bourammiah v. Mallammal*, 4 M.L.T. 315.

Where there are several lessors, *all* the lessors must act together. If *all* of them have not shown their intention to determine the lease, *e.g.* if all the co-owners in the land have not joined in giving the notice, they cannot succeed. See *Gopal Ram v. Dhakeswar*, 35 Cal. 807 (811). But the Madras High Court is of opinion that one of several joint lessors who has become separately entitled to his share of the lands leased, is entitled to enforce the forfeiture clause in the lease-deed separately as regards his share of the lands, as if he had given a separate lease of his own share alone originally to the lessee—*Korapalu v. Narayana*, 38 Mad. 445 (447), following *Sri Raja Simhadri v. Prattipati Ramayya*, 29 Mad. 29, and dissenting from *Gopal Ram v. Dhakeswar*, supra.

Where the landlord gives notice of his intention to determine the lease, *i.e.* when he elects to determine the tenancy, the election is irrevocable, and the parties cannot by a subsequent agreement revive the old tenancy—*Chengiah v. Raja of Kalahasti*, 24 M.L.J. 263, 15 I.C. 445. Thus, there can be no revival when a forfeiture has been incurred and the lessor has given a *fresh lease* of the land to a third party. In such a case the old lease cannot be revived by simply saying that the lessor and the lessee agree to be bound by the terms of the old lease. It is difficult to see how a transaction which the law requires to be in writing registered can be created by a declaration of the parties that an extinct lease subsists—*Malabar Timber Co. v. Prapravan*, 126 I.C. 284, A.I.R. 1930 Mad. 272 (276). Similarly, if he elects not to enforce the forfeiture, and manifests and communicates to the lessee his intention accordingly, that is, when he elects to waive the forfeiture, his election is also irrevocable—*Chengiah v. Raja of Kalahasti*, 24 M.L.J. 263, 15 I.C. 445. As to what amounts to waiver of forfeiture, see section 112.

This clause, however, does not apply to leases created *prior to* the passing of this Act. See sec. 2 (c). In case of such leases, it is not necessary that the lessor should, prior to the action for ejectment, give notice of his intention to determine the lease. The institution of an action on the ground of forfeiture itself amounts to a manifestation of the lessor's intention to determine the tenancy—*Padmanabhaya v. Ranga*, 34 Mad. 161 (166), 6 I.C. 447; *Venkatachariar v. Rangaswami*, 36 M.L.J. 532, 51 I.C. 709; *Ramkrishna v. Baburaya*, 23 M.L.J. 715, 24 I.C. 139. In *Venkataramana v. Gundaraya*, 31 Mad. 403, however, the principle of this clause was applied to a lease created before the passing of the Transfer of Property Act.

This clause is also inapplicable to leases not governed by this Act (*e.g.*, agricultural leases), and the landlord will in those cases be entitled to bring a suit for ejectment without having done any prior act evincing his intention to determine the lease—*Korapalu v. Narayana*, 38 Mad. 445 (448), 20 I.C. 930; *Vidyapurna v. Rangappayya*, 25 M.L.J. 486, 21 I.C. 405.

602. Clause (h)—Notice to quit:—A suit for ejectment cannot be maintained unless the tenancy has been determined by either a previous notice to quit or demand for possession. Whether a mere demand for possession is enough in a particular case, or whether a notice to quit is necessary, depends upon the status of the tenant. If the status of a tenant is that of a mere tenant-at-will, a demand for possession would be sufficient—*Deonandan v. Meghu*, 34 Cal. 57.

If a lease is granted by a Municipality, it can be terminated by the Municipality according to law, and only by issuing a proper notice as required by the Transfer of Property Act, because the Municipality is not outside the provisions of this Act. The Municipality cannot determine the lease by simply passing a resolution, and then and there requiring the lessee to quit—*Aminullah v. Emp.*, 26 A.L.J. 328, 107 I.C. 690, A.I.R. 1928 All. 95.

As to what is a valid notice, see notes under sec. 106.

112. A forfeiture under section 111 clause (g) is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

602A. This section has been enacted for the benefit of the tenant, and hence Woodfall gives the following warning to the landlords: "Courts of law always lean against forfeiture; therefore whenever a landlord means to take advantage of any breach of covenant or condition so that it should operate as a forfeiture of the lease, he must take care not to do anything which may be deemed an acknowledgment of the continuance of the tenancy and so operate as a waiver of the forfeiture"—*Landlord*

and Tenant, 19th Edn., p. 367. The principle of the section is this:—"The landlord may elect to avoid a lease and bring ejectment when his tenant has committed a forfeiture. If, with knowledge of the forfeiture, by receipt of rent or other unequivocal act he shows his intention to treat the lease as subsisting he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shows his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture"—*per Mellor, J. in Clough v. London and N. W. Ry. Co.*, (1871) 7 Ex. 26 (34).

603. Waiver of forfeiture by acceptance of rent:—If a lessor, after notice of forfeiture of the lease, accepts rent which accrues after, this is an act which amounts to an affirmance of the lease and a dispensation of the forfeiture—*Pennant's Case*, 3 Rep. 64a cited in *Croft v. Lumley*, 6 H.L.C. 672. Where the lessee incurred a forfeiture of the lease by reason of construction of some buildings in contravention of the terms of the lease, but the lessor afterwards accepted rent from the tenant and there was no reason to suppose that the rent was accepted in ignorance of what the tenant had been doing, *held* that there was a waiver of forfeiture—*Chattar v. Nand Kishore*, 12 A.L.J. 1139, 26 I.C. 107 (108). Where there is a proviso in a lease for forfeiture on assignment without the consent of the lessor, the acceptance of rent by the lessor from the assignee operates as a waiver of forfeiture—*Saraf Ali v. Subraya*, 20 Bom. 439. So also, where after the denial of landlord's title, the landlord receives rent from the tenant, he cannot rely upon the denial as a ground of forfeiture—*Farman Bibi v. Shaikh Tashi*, 12 C.W.N. 587. Where a lease provided that out of the rents payable by them the lessees were to pay the Government revenue, then if after the termination of the lease, the lessor allowed the lessees to pay the Government revenues on two occasions, such payments were in a reality payments of rent, and the lease was not therefore brought to a termination but was allowed to run out—*Sadai Naik v. Serai Naik*, 28 Cal. 532.

Waiver by the subordinate officers of the Government is binding on the Government. Thus, where the realisations of rent by the subordinate officers of Government were on behalf of the Government and the Government had the benefit of those realisations, and the officers had knowledge of the incurring of the forfeiture, the waiver was binding on the Government—*Basanta Kumar v. Secretary of State*, 59 I.C. 273 (Cal.).

Acceptance of the rent even under protest amounts to an acceptance under this section sufficient to operate as a waiver—*Davenport v. Queen*, L.R. 3 App. Cas., 115 followed in *Kali Krishna v. Fuzle Ali*, 9 Cal. 843; *B. N. Ry. Co. v. Balmukunda*, 80 I.C. 200, A.I.R. 1923 Cal. 663 (664). The protest is altogether inoperative, because the lessor had no right at all to take the money unless he took it as rent; he cannot be allowed to say that he wrongfully took it on some other account; and if he took it as rent, the legal consequences of such act must follow, however much he may repudiate them—*Croft v. Lumley*, 6 H.L.C. 672. Therefore, acceptance of rent constitutes waiver of forfeiture, notwithstanding that the lessor expressly states that he accepts the money as compensation for use and occupation and not as rent—*Ibid*.

There is a waiver of forfeiture under this section if the lessor accepts or demands rent which has accrued due *after* the forfeiture; but a claim, in a suit for ejectment, for rent which fell due *before* forfeiture does not

amount to a waiver and cannot negative the plaintiff's right to seek ejectment—*Padmanabhaya v. Ranga*, 34 Mad. 161 (162), 6 I.C. 447. Where it appeared that rent for a period *subsequent* to the forfeiture had not only been accepted but was realised by attaching the moveable property of the lessee, *held* that there was a waiver of forfeiture—*Basanta Kumar v. Secy. of State*, 59 I.C. 273 (Cal.). A forfeiture may be waived by acceptance of rent or by suing for rent, but if the landlord *definitely determines the lease*, after the forfeiture, by giving a notice to quit, a subsequent suit for rent for the period subsequent to the forfeiture, does not amount to a waiver, and the tenant is not liable to pay rent for the period subsequent to the termination of the lease by notice to quit—*Upendra v. Dhubeshwar*, 12 P.L.T. 225, A.I.R. 1931 Pat. 240.

Where two persons have jointly leased out a land, and have subsequently become divided, one of them may enforce the forfeiture clause in the lease with respect to his moiety of the land, notwithstanding that the owner of the other moiety has waived his right to enforce the same by receiving his moiety of the rent—*Korapalu v. Narayan*, 38 Mad. 445, 20 I.C. 930.

604. "Any other act":—The forfeiture may be waived by subsequent demands for rent—*Kristo Nath v. Brown*, 14 Cal. 176 (184). Thus, if in a suit for ejectment brought on the ground of forfeiture for non-payment of rent, the plaintiff also claims rents for periods subsequent to the period of default, the suit fails, because by making such a claim the plaintiff must be deemed to have waived the forfeiture under this section—*Abdul Rashik v. Safar Ali*, 42 I.C. 614 (Cal.). So also, where a lease provided for forfeiture on assignment by the lessee without the consent of the lessor, the landlord's entering into an agreement with the assignee in respect of repairs of the premises operated as a waiver of forfeiture—*Saraf Ali v. Subraya*, 20 Bom. 439.

But merely lying by and witnessing the breach is no waiver; some positive act must be done. The general rule is that if a lessor or the person legally entitled to the reversion, knowing that a forfeiture has been incurred by the breach of any covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at a later period, he thereby waives such forfeiture—*Woodfall's Landlord and Tenant*, 19th Edn., p. 376. Where a landlord instead of exercising his right of forfeiture allowed a tenant to continue in possession of the premises and treated him as tenant, he must be held to have waived the forfeiture—*Thandu Parakal v. Ammalu*, 8 M.L.T. 238, 8 I.C. 309.

604A. Waiver cannot be revoked:—If the lessor elects not to enforce the forfeiture and manifests or communicates to the lessee his intention accordingly, that is, if he waives his forfeiture, the waiver is irrevocable—*Chengiah v. Raja of Kalahasti*, 24 M.L.J. 263, 15 I.C. 445.

1st Proviso:—There can no waiver unless the lessor has acted with notice or *actual knowledge* of the forfeiture. It is not enough for the lessee to prove merely an act of the lessor showing recognition of the tenancy or to show that the lessor's ignorance of the breach has not been proved. The onus is on the lessee to prove positively that the lessor had knowledge of the breach and yet continued to recognise the tenancy—*Swarnamoyee v. Aoyajaddi*, 36 C.W.N. 819 (822), 139 I.C. 239, A.I.R. 1932 Cal. 787; *Mathews v. Smallwood*, [1910] 1 Ch. 777.

605. 2nd proviso—Acceptance of rent after suit:—Acceptance of rent by the landlord from the tenant, after the institution of a suit for eviction on the ground of forfeiture incurred by the tenant for breach of a condition in the lease, does not operate as a waiver of the forfeiture—*Padmanabhaya v. Ranga*, 34 Mad. 161 (162); *Mazhoor v. Padiyapurayil*, 8 M.L.T. 99, 1910 M.W.N. 484, 6 I.C. 264. Where the lessors brought ejectment against the tenant on the ground of forfeiture for breaches of covenants which provided for re-entry, it was held that a distraint for rent after commencement of the action did not operate as a waiver, and the plaintiffs were entitled to judgment—*Grimwood v. Moss*, 7 C.P. 360. If the suit for ejectment is brought on the ground of forfeiture for *non-payment of rent*, and after such suit the tenant pays rent, the rule in sec. 114 will apply.

113. A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it, showing an intention to treat the lease as subsisting.

Waiver of notice to quit.

Illustrations.

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

606. Scope of section:—This section deals with the waiver of notice to quit just as the last section deals with the waiver of forfeiture. But the distinction between the two lies in this: a forfeiture can be waived without the lessee being a consenting party thereto; it is entirely at the option of the lessor to waive the forfeiture or not. But in a waiver of a notice to quit the express or implied consent of the lessee is necessary; in other words a notice to quit cannot be waived without the assent of both the lessor and lessee—*Blyth v. Dennett*, (1853) 13 C.B. 178 (180). The parties must come to a definite agreement; otherwise there can be no waiver. The mere fact that negotiations and discussions which did not come to anything took place between the parties subsequent to the notice to quit, does not show that there was waiver—*Thai Un v. Mahomed Ajam*, 6 Bur.L.J. 164, 104 I.C. 335, A.I.R. 1927 Rang. 276 (277).

Where after the notice to quit has been served and the ejectment proceeding instituted, the landlord has claimed and accepted rent which has *accrued after* the expiration of the notice, such claim and acceptance of rent would amount to a waiver of the notice to quit. But a claim for arrears of rent due *prior* to the ejectment proceedings, even though such claim is made after the notice to quit was served, does not constitute a waiver of the notice to quit—*Shah Wali Ahmad v. Hussaini Begum*, 2 P.L.J. 595, 42 I.C. 655.

Where subsequent rent is accepted after the notice to quit, whether before or after a suit for ejectment has been filed, the landlord thereby

shows an intention to treat the lease as subsisting. It cannot be argued on the analogy of the second proviso to sec. 112, that the acceptance of rent after the suit for ejectment has been filed does not amount to a waiver of the notice to quit; for had it been intended that acceptance of rent after suit should not operate as a waiver in the case of a notice to quit, a proviso similar to that in sec. 112 would have been incorporated in sec. 113—*Maniklal v. Kadammini*, 43 C.L.J. 272, 94 I.C. 156, A.I.R. 1926 Cal. 763.

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture, and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Relief against forfeiture for non-payment of rent.

607. Scope:—This Act does not apply to agricultural leases, but the principle of this section may be acted upon in case of such leases. A condition in a lease which enables the landlord to re-enter on non-payment of rent is regarded as penal, and should be relieved against by the Court, even though the case does not fall under this Act—*Vaguran v. Rangayyanar*, 15 Mad. 125 (126). This section will apply to relieve the tenant against forfeiture even though the case is governed by the special provisions of the Calcutta Rent Act. The Transfer of Property Act must not be deemed to have been abrogated by the provisions of the Calcutta Rent Act which is an Act of a Local Government—*Ahindra v. Twiss*, 49 Cal. 150 (160), A.I.R. 1922 Cal. 394, 70 I.C. 75.

This section has been enacted to relieve the tenant from the extreme penalty of forfeiture to which the literal enforcement of his contract might have otherwise exposed him. Under this section the Court has a discretion to relieve him against forfeiture and not to make a decree for ejectment, if the lessee pays or tenders the rent in arrears with interest and full costs of suit—*Kundan v. Kallu*, 12 A.L.J. 650, 24 I.C. 79. Provisions for forfeiture of leases for non-payment of rent are intended merely as a security for the non-payment of rent, and a Court of Equity will relieve the lessee and set aside a forfeiture, on his bringing the rent into Court. This principle of English law has been recognized by the Legislature in sec. 114 of the T. P. Act—*Megh Lal v. Raj Kumar*, 34 Cal. 358 (368). Thus, where the landlord had taken a large sum by way of premium under a registered lease for ten years, and the rent was payable on the first of every lunar month failing which the lease was to stand cancelled, *held* that it was against equity and good conscience to allow the landlord to cancel the lease, after having taken a large sum as premium, simply on account of a few days' delay in payment of rent, especially in a case in which the lessee had not even then taken possession of the leased premises—*Kallan v. Jawahir*, 5 Lah.L.J. 99, 71 I.C. 837, A.I.R. 1924 Lah. 49 (50).

And this section gives the lessee the last chance of saving himself from the operation of the forfeiture clause.

It should be noted that this section relieves only against forfeiture for non-payment of rent, and does not relieve against forfeiture occasioned by other causes. Section 114A has been newly enacted to give relief against forfeiture due to breach of an express condition.

Under this section the Court is invested with a *discretionary* power to grant relief which it may or may not exercise in favour of the tenant. It cannot be said that merely because the tenant has complied with the conditions laid down in sec. 114 by depositing in Court the rent in arrear he becomes entitled as of right to the relief. The Court has a discretion to give relief or not, according to the special circumstances of the case, having regard to the conduct of the tenant and to any equities that may have arisen between the date of forfeiture and the application for relief—*Debendra v. Cohen*, 54 Cal. 485, A.I.R. 1927 Cal. 908 (910), 106 I.C. 477. This discretion has to be exercised on proper judicial grounds, and if the Court of first instance has exercised that discretion, and there is nothing to show that there was anything wrong in principle, the Appellate Court should not interfere. But if the Appellate Court finds that the discretion has been exercised by the first Court in a capricious and whimsical manner, and not on any judicial principle, then the Appellate Court should interfere—*Ramabrahman v. Rami Reddi*, 1927 M.W.N. 305, 108 I.C. 273, A.I.R. 1928 Mad. 250 (253).

The mere fact that the lessee pleads payment of rent which he fails to prove does not in itself disentitle him to the relief given under this section—*Ramakrishna v. Baburaya*, 23 M.L.J. 715, 24 I.C. 139 (141).

The principle of this section is applicable not only to the original lessee but also to the transferee of the lessee (where the lessee is permitted to transfer); the transferee must be deemed to stand in the shoes of the transferor and is as much entitled to be relieved against as the original tenant—*Ahmad Husain v. Riaz Ahmad*, 12 A.L.J. 1085, 25 I.C. 186.

Although this section does not apply to agricultural leases, still the Court has got power to relieve against forfeiture in case of such leases independently of this section, on such conditions as may appear equitable on the facts of each particular case, and is not bound by the conditions of this section—*Rama Krishna v. Fernandez*, A.I.R. 1927 Mad. 239, 98 I.C. 851.

Relief against forfeiture for non-payment of rent was given in case of leases created prior to the passing of this Act. See *Narayana v. Narayana*, 6 Mad. 327 (330).

608. Payment or tender of rent:—Since the lessee is allowed to pay the arrears of rent at the time of hearing, it follows that the lessee is at liberty to tender the amount at any time *before* the institution of the suit, and the lessor cannot refuse to accept it. If the lessor refuses to accept it and files a suit for ejectment, he does so at his own risk, and the lessee will not be liable to forfeiture, nor to pay the costs of the suit—*Krishnaswami v. Natal Emigration Board*, 17 Mad. 216.

If the tenant deposits the rent with the Rent Controller, under the provisions of the Calcutta Rent Act, that would be a sufficient compliance with the provisions of this section and would relieve the tenant against forfeiture—*Ahindra v. Twiss*, 49 Cal. 150, A.I.R. 1922 Cal. 394, 70 I.C. 75.

The lessee is not entitled to the benefit of this section when he omits to make any tender before suit, or to pay the money into Court, and on the contrary pleads payment unsuccessfully—*Narayana v. Handu*, 15 M.L.J. 210.

“Rent in arrear”:—This expression includes *time-barred* rents. Though in a suit for rent the landlord cannot recover arrears for more than three years, yet in a suit for ejectment by the landlord on the ground of forfeiture of the lease owing to non-payment of rent, the Court can relieve the tenant against the forfeiture only on condition of his paying the full arrears of rent, though it is for a longer period than three years—*Vasudeva v. Krishna Udpa*, 44 Mad. 629, 40 M.L.J. 460, 62 I.C. 583.

The rent to be tendered under this section need not be the rent stipulated in the lease; if a standard rent has been fixed by the Rent Controller under the Calcutta Rent Act, the tenant may deposit that rent, and by so doing will be entitled to relief against forfeiture—*Ahindra Nath Chatterjee v. Twiss*, 49 Cal. 150, A.I.R. 1922 Cal. 394, 70 I.C. 75.

The “rent in arrear” means not only the rent claimed in the suit but includes all that is due to the lessor up to the date when the application for ejectment is heard—*Dhurumtolla Properties Ltd. v. Dhunbai*, 58 Cal. 311, A.I.R. 1931 Cal. 457, 132 I.C. 87.

609. Forfeiture and nullity:—In the old clause (g) of sec. 111, it was stated that forfeiture could take place upon the breach of an express condition which provided that on breach thereof the ‘lessor may re-enter,’ or the ‘lease shall become void.’ So that, no distinction was made between a case in which a lessor could re-enter on breach of an express condition and a case in which the lease became void on breach of the condition. In other words, the Act made no difference between a condition of forfeiture and a clause of nullity. And in either case the Court could grant relief under sec. 114. Therefore where there was a covenant in a lease that ‘on failure to pay rent the lease shall become null and void,’ this section operated to relieve against the forfeiture, in spite of the nullity clause, and protected the tenant from ejectment for non-payment of rent, if he paid the rent in Court—*Hiranandan v. Ramdhar*, 1 Pat. 363, A.I.R. 1922 Pat. 528, 69 I.C. 886.

In the present clause (g) of sec. 111, however, the words “or the lease shall become void” have been omitted, and the ruling of the above Patna case is no longer of any importance.

610. No relief when period of grace is allowed:—The equitable relief given to the lessee under this section is provided as a matter of grace. And the Court will not grant any relief under this section where a period of grace has already been allowed by the lease itself for the payment of rent. Thus, where the lease contains a provision to pay rent on the 15th of April, but no forfeiture is provided for on account of default of such payment, and it further provides that if the default continues until December then the lease is to be forfeited, *held* that the lease provides a sufficiently long period of grace, and that if the tenant fails to pay within December and the landlord has consequently to sue for ejectment upon forfeiture, the Court will not grant relief to the lessee by allowing him to pay the rent during the hearing of the suit—*Narayana v. Vasudeva*, 28 Mad. 389; *Narayan v. Handu*, 15 M.L.J. 210; *Mahalakshmi v. Lakshmi*, 21 M.L.J. 960, 12 I.C. 456; *Adhiragi v. Billa*, 20 M.L.J. 944, 6 I.C. 438; *Arju v. Narayan*, 19 N.L.R. 50, 71 I.C. 445, A.I.R. 1923 Nag.

193. But the Bombay High Court does not favour this view, and holds that the tenant should be relieved against forfeiture, even though the rent was not paid within the period of grace allowed by the lease—*Krishnaji v. Sitaram*, 45 Bom. 300, 59 I.C. 769, 22 Bom.L.R. 1439. In some other cases the Madras High Court has said that the question whether a tenant is entitled to relief against forfeiture for non-payment of rent must depend upon the *facts of the particular case*, and that the Courts have power to grant relief even in cases where a period of grace is allowed for payment of the rent. The condition of forfeiture of a tenancy should be regarded as penal in its nature and the equitable provision of sec. 114 should generally be given effect to—*Ramabrahman v. Rami Reddi*, 1927 M.W.N. 305, A.I.R. 1928 Mad. 250 (252), 108 I.C. 273; *Appayya v. Mahomed Behari*, 29 M.L.J. 381, 30 I.C. 596.

611. Which Court can grant relief:—Besides the original Court, the Appellate Court also can grant relief against forfeiture incurred for non-payment of rent, on the tenant making the payment or tender of the arrears of rent at the hearing of the appeal, even though such offer was not made in the lower Court—*Vidyapurna v. Rangappaya*, 25 M.L.J. 486, 21 I.C. 405.

Relief after decree:—The execution Court also has power to grant relief against forfeiture, if the decree is a *consent decree*. Thus, where a compromise decree contained a stipulation that on failure by the defendant to pay the rent within the time fixed for each year, the lease was to be forfeited, and the defendant not having tendered the rent for a particular year, the decree-holder applied for possession of the lands according to the terms of the decree, whereupon the defendant contended that relief ought to be given to him, *held* that it was competent to the Court to relieve the defendant against the forfeiture by allowing him to pay the rent—*Nagappa v. Venkat Rao*, 24 Mad. 165; *Krishnabai v. Hari*, 31 Bom. 15 F.B. (overruling *Shirekulli v. Mahabyla*, 10 Bom. 435). If a decree, which is *not a consent decree*, was to the effect that “if the defendant pays to the plaintiffs the arrears of rent together with interest and costs on or before the 20th February, he be relieved as against forfeiture, and in case of default, the defendant be evicted and plaintiffs be put into possession of the respective land,” and the defendant failed to pay within 20th February, whereupon the plaintiffs applied for getting possession of the property, *held* that the decree not being a consent decree, no relief could be granted, even though it appeared that the defendant made some payments after 20th February which were accepted by the plaintiffs—*Giridharadoss v. Para Appadurai*, 51 Mad. 157, 54 M.L.J. 316, A.I.R. 1928 Mad. 193 (194), 107 I.C. 792. In *Krishna Rao v. Balwant*, 27 Bom.L.R. 678, 89 I.C. 217, A.I.R. 1925 Bom. 404, relief was granted on the special facts of the case, although it was not a consent decree.

114A. *Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—*

Relief against forfeiture
in certain other cases.

- (a) *specifying the particular breach complained of; and*
- (b) *if the breach is capable of remedy, requiring the lessee to remedy the breach;*

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

611A. This section has been inserted by sec. 58 of the T. P. Amendment Act (XX of 1929) for the following reasons:—

“As the Transfer of Property Act stands, the only case in which relief against forfeiture is provided for is non-payment of rent—in section 114 of the Act. Considerable hardship has been caused in cases where forfeiture accrues on breach of an express condition which provides that on breach thereof the lessor may re-enter, although the breach may be capable of easy remedy. This defect does not exist in the English law where there was provision made by the Conveyancing Act of 1881 for relief against forfeiture in such cases. These provisions of the Conveyancing Act are reproduced in the English Law of Property Act, 1925, section 146. We think it desirable that similar provisions, suitable to Indian conditions should be introduced in the Transfer of Property Act, and we have accordingly added section 114A.”—*Report of the Special Committee.*

Prior to the enactment of this section it was held that the Court could not give relief where the forfeiture took place by reason of a breach of condition in the lease, *e.g.*, breach of a covenant to repair—*Debendra v. Cohen*, 54 Cal. 485, A.I.R. 1927 Cal. 908 (910), 106 I.C. 477. The present section would give relief to the tenant in such cases.

The second para lays down that this section does not apply to a case of breach of an express covenant against assigning the property leased. See sec. 14 (6), Conveyancing Act, 1861, reproduced in sec. 146 (8), Law of Property Act, 1925. The reason is obvious: relief can be given against forfeiture for breach of a condition, when the breach is *capable of remedy*, but when it is incapable of remedy by reason of the fact that at the time the relief is asked for the position of parties has been altered, and the interests of third parties have intervened, the relief cannot be given, for to do so would be to cause injury to third parties—*Newbolt v. Bingham*, (1895) 72 L.T. 852; *Stanhope v. Hanworth*, (1886) 3 T.L.R. 34. In a Madras case, it was likewise held, following the English law, that there was no relief where the tenant forfeited the tenancy by reason of an *alienation* of the leasehold interest without the consent of the landlord—*Krishna Shetti v. Gilbert Pinto*, 42 Mad. 654 (659).

Where in an agricultural lease there was a covenant against alienation, and the tenant mortgaged his land, whereupon the landlord sued to eject the tenant, it was held that relief should be given to the tenant, *firstly*, because it was an agricultural lease which is exempted from the T. P. Act and therefore the restrictions contained in this Act did not apply; and *secondly*, because there was no absolute alienation, but only

a mortgage. And so the Court gave the tenant three months' time within which to release the land from the mortgage—*Janardan v. Mhalappa*, 50 Bom. 450, A.I.R. 1926 Bom. 304 (305), 94 I.C. 1054.

But neither the Transfer of Property Act nor the English law gives relief to a tenant, where the forfeiture takes place by reason of *denial of landlord's title*, unless the tenant can prove that the denial was occasioned by fraud, mistake or accident of the landlord and that the tenant himself had not acted with carelessness or negligence—*Kemalooti v. Muhamed*, 41 Mad. 629 (631), following *Barrow v. Isaacs*, (1891) 1 Q.B. 417 (*per* Lord Esher, J.).

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to, and enforceable by, the lessor.

Effect of surrender and forfeiture on under-leases.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

612. Principle and scope:—"It is a rule of law that if there is a lessee, and he has created an under-lease or any other legal interest, then if the lease is *forfeited*, the under-lessee, or the person who claims under the lessee, loses his estate as well as the lessee himself; but if the lessee *surrenders*, he cannot, by his own voluntary act in surrendering, prejudice the estate of the under-lessee or the person who claims under him."—*Great Western Railway Co. v. Smith*, 2 Ch. 235.

In the second para the word "lessor" should be "lessee." It is against the fraud of the *lessee* that the section intends to protect the under-lessee.

This section is confined only to under-leases, and does not apply to the assignee of a lessee. Therefore a denial of the lessor's title by the original lessee will not work a forfeiture against the *assignee* of the lessee. The second para of this section will not apply to the case, as it speaks of the effect of forfeiture on *underleases*. "The Transfer of Property Act very emphatically recognises that the interests of the lessee in the property may be transferred to an assignee and this may be done without the consent of the lessor; and if that can be done it seems to me to follow as a matter of reason that when the entire interest has been transferred by the lessee to the assignee, then the assignee is not responsible for the acts done by the lessee"—*per* Heaton, J. in *Gopal Jayvant v. Shrinivas*, 42 Bom. 734 (741), 20 Bom.L.R. 820, 47 I.C. 635.

Under this section, the sub-lease becomes void only when the original lease becomes *forfeited*; if the interest of the original lessee is not forfeited but merely sold in execution of a decree obtained against him by

his lessor for arrears of rent, the interest of the sub-lessee is not affected by such sale—*Vishnu Atmaram v. Anant Vishnu*, 14 Bom. 384.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Effect of holding over.

Illustrations.

(a) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

613. English and Indian law:—The rule embodied in this section differs from the English law in this respect that while under this section the term of the new tenancy is decided according to the *purpose for which the property is leased*, under the English law the tenancy is deemed to continue according to the *terms of the original tenancy*. Thus, where a lease of land was granted for a term of years, and the property leased was not used for agricultural or manufacturing purposes and was held over by the lessee after the expiration of the term, *held* according to Indian law that the lessee must be deemed to be a tenant from month to month (sec. 106) and entitled only to 15 days' notice to quit—*Troilokya v. Sarat Chandra*, 32 Cal. 123; *Bijoy Chandra v. Howrah Amta Light Ry.*, 38 C.L.J. 177, 72 I.C. 98, A.I.R. 1923 Cal. 524. But under the English law, "where a tenant for a term of years holds over after the expiration of his lease.....a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease so far as the same is applicable to and not inconsistent with the yearly tenancy.....In the absence of any evidence one way or the other, it seems that upon the holding over and payment of rent, the Jury would be directed to find a tenancy on the terms of the expired lease"—Woodfall's *Landlord and Tenant*, 17th Ed., p. 246.

614. Holding over:—A distinction should be drawn between a tenant continuing in possession after the determination of the lease, *without* the consent of the landlord, and a tenant doing so *with* the landlord's consent. The former is called a *tenant 'by sufferance'* in the language of English law; the latter class of tenant is called a tenant 'holding over' or a *tenant at-all*. A tenant by sufferance is no better than a mere trespasser and he can be turned out at any time without any notice to quit—Woodfall, p. 366; *Barry v. Goodman*, 2 M. & W. 768; *Moore v. Makham Singh*, 53 I.C. 180 (P.C.). "The difference between a tenancy-at-will and a tenancy by sufferance is that in the one case the tenant holds by right and has an estate or term in the land, precarious though it may be, and

the relationship of the lessor and the lessee subsists between the parties; in the other, the tenant holds wrongfully and against the will and permission of the lord, and has no estate at all in the occupied premises"—Addison's Law of Contract, 10th Edn., p. 618. Thus, if a Hindu woman in possession of a raiyati holding as a limited owner grants a *mokarari* lease of the holding, the lease is valid only during the lifetime of the limited owner, and after her death the reversioner may treat the tenant as trespasser and sue to eject him without giving any formal notice to quit—*Raghubir Singh v. Jethu Mahton*, 2 Pat. 171, 4 P.L.T. 396, A.I.R. 1923 Pat. 130, 70 I.C. 290. Where a lessee holds over after the expiry of his term without the express or implied consent of his landlord, he is only a trespasser and if he is dispossessed by a person claiming under the landlord, he cannot maintain a suit for possession or declaration of title based upon his previous possession—*Mathura Prasad v. Naju Khan*, 4 P.L.T. 696, A.I.R. 1921 Pat. 463, 80 I.C. 568, and 6 P.L.T. 142. (But see *Rudrappa v. Narasingrao*, 29 Bom. 213, where a tenant by sufferance, who was evicted by his landlord *proprio motu*, brought a suit against the landlord under sec. 9 of the Specific Relief Act, and recovered possession). If he refuses to leave the premises after being requested to depart, and offers any resistance, the landlord may use such force and violence as may be necessary to overcome such resistance—Woodfall, p. 780. But entirely different is the position of a tenant holding over, whose possession continues with the consent of the landlord and is therefore not wrongful, and he cannot be ejected without due notice—*Chaturi v. Mukund*, 7 Cal. 710.

This section enacts that if after the termination of the lease, the tenant continues in possession, and the landlord accepts rent or otherwise gives consent to his remaining in possession, such action has the effect of converting the tenant by sufferance into a tenant-at-will. But this rule applies only to the original tenant, and not to his *representatives*. Therefore, if the original tenant dies and his representative enters into possession, he does so as a trespasser, and the landlord cannot, by mere assent under this section, convert such representative into a tenant, unless a new tenancy is created by the consent of both parties—*Vadapalli v. Dronamraju*, 31 Mad. 163. Sec. 116 deals with the effect of holding over by a lessee, and with the creation of a fresh tenancy by implication. The kind of tenancy under section 116 is only created by law in favour of the *original* lessee. Therefore section 116 applies only to the case of a lease fixed for a term of years and not a lease for life. The *representatives* or assignees of the tenant for life will not become tenants from year to year, without the formalities of sec. 107; that is, they can become tenants from year to year only by means of a registered document. They may, of course, become tenants at will or for a year without any registered document, that is, by verbal contract—*Ram Rachhya v. Kamakhya Narayan*, 4 Pat. 139, A.I.R. 1925 Pat. 216, 84 I.C. 586, 6 P.L.T. 12. And so, where after the death of the original mukarraridars, who were tenants for life, the heirs remained in possession and paid rent to the lessor, but the receipts were given in the *marfatdari* form, and the lessor refused to give receipts to the persons paying the rent in their own name, *held* that the lessor did not recognize the heirs of the mukarraridars as tenants from year to year, that there was not even any relationship of landlord and tenant between the parties, and that sec. 116 did not apply—*Kamakhya Narayan v. Ram Raksha*, 7 Pat. 649 (P.C.), 9 P.L.T. 501, 32 C.W.N. 897 (901, 902, 905), A.I.R. 1928 P.C. 146, 109 I.C. 663, affirming *Ram*

Rachyya v. Kamakhya Narayan, supra. Section 116 does not contemplate the holding over by the heirs of the original lessee, and therefore the heirs cannot, by continuing in possession, acquire the status of a tenant holding over after the determination of the lease—*Charan v. Kamakhya Narayan*, 6 P.L.T. 98, 88 I.C. 387, A.I.R. 1925 Pat. 357. But where the original lessee holds over by consent of the lessor and becomes a tenant, his interest is assignable, and the lessor can sue the assignee for rent from the date of transfer—*Bengal National Bank v. Janoki Nath*, 54 Cal. 813, 31 C.W.N. 973, 104 I.C. 484, A.I.R. 1927 Cal. 725 (730).

The holding over by one or more co-tenants without the consent of the others cannot render the person not so holding over liable for rent. In order to make the estate of a deceased co-tenant liable for rent due for holding over, the onus lies heavily on the plaintiff (landlord) to prove clearly and conclusively, that after the expiry of the old lease a new contract was made by and between the plaintiff on the one hand and *all* the co-tenants (including the co-tenant whose estate is sought to be made liable) on the other, making themselves jointly and severally liable to perform the conditions of the tenancy—*Brojo Lal Roy v. Belchambers*, 9 C.W.N. 340.

615. Assent of lessor:—In order to justify a holding over, it must be proved that the landlord has either accepted rent or has otherwise *assented* to the tenant's continuing in possession. It must be proved that there was a direct consent on the part of the landlord; no *implication* of consent can arise merely by reason of the landlord's passive failure to take steps to eject the tenant—*Govindaswami v. Ramaswami*, 30 M.L.J. 492, 34 I.C. 6 (8); *Ratan v. Farashi Bibi*, 34 Cal. 396. But where after the expiry of the lease, the landlord neither took rents nor brought a suit for ejectment for so long a period as 10 years, it must be presumed that he assented to the holding over, and that the lessee was not to be deemed a trespasser—*Safar Ali v. Abdul Majid*, 31 C.W.N. 282 (285), 100 I.C. 614, A.I.R. 1927 Cal. 279. Where after the expiry of the period of the *Kabuliat*, the landlord sued the tenant for rent and obtained a decree, that decree must be held to be an adjudication that after the date of the expiry of the *kabuliat*, the defendant continued in possession, as a tenant and was liable to payment of rent—*Balaji v. Ramchandra*, 27 Bom. 262. But if the landlord brings a suit for *damages for use and occupation*, it does not convert the defendant into a tenant, and the lease is not renewed—*Govindaswami v. Ramaswami*, supra.

The burden of proving that the landlord has assented to the continuance of possession lies on the tenant. Although it is a general presumption of law that when the existence of a relationship is once proved such relationship continues till it is shown to have ceased, still when it appears that the relationship of the parties is such that, but for the existence of some special contract, the landlord would have had a right to eject the tenant, the burden of proving that the latter is entitled to resist ejectment lies on the tenant—*Keshav v. Puran*, 1 N.L.R. 32.

Where a landlord accepts rent for a quarter from a tenant holding over, it does not imply a promise by the landlord that the tenant would be allowed to stay for the whole year—*Matilal v. Darjeeling Municipality*, 17 C.L.J. 167, 18 I.C. 844.

The assent referred to in this section is the assent of the *lessor* and

not that of the lessee. The option of giving an assent is one that is conferred on the lessor and not on the lessee—*Meghji v. Dayalji*, 48 Bom. 341 (345), A.I.R. 1924 Bom. 322, 80 I.C. 507, 26 Bom.L.R. 231.

Legal representative:—This expression is not defined in the Act, but it clearly implies a person who occupies the same position as the lessor. It does not include an intermediate lessee who has sublet the land to a sublessee—*Durgi Nikarini v. Gobordhan*, 19 C.W.N. 525 (529), 24 I.C. 183.

“Agreement to the contrary”:—The expression “agreement to the contrary” means an agreement as to the terms of the holding over—*Troilokhya v. Sarat Chander*, 32 Cal. 123 (127); *Gobinda v. Dwarka*, 19 C.W.N. 489 (492), 26 I.C. 962. This agreement must be *express*, and not implied. And so where a tenant took the premises for a shop for one year, and the rent was fixed for one year, and then at the end of the year the tenant continued in occupation, but there was no *express* agreement as to the terms of the holding over, it could not be *implied* that if the tenant held over he would hold over from year to year. As it was a non-agricultural tenancy, the tenant must be deemed to hold over from month to month—*Gobinda v. Dwarka*, *supra*. [In *Matilal v. Darjeeling Municipality*, 17 C.L.J. 167, 18 I.C. 844 (846), it was remarked that the “agreement to the contrary” need not be express, but may be *implied*.] If a tenant who originally held under a lease for nine years certain, at a yearly rent, held over after the expiry of nine years, and then the landlord *expressly treated* the tenant as holding on from year to year under the terms of the *original contract* of lease, the presumption of this section would not apply and the tenancy would be a tenancy from year to year and terminable by six months’ notice—*Chattar v. Nand Kishore*, 12 A.L.J. 1139, 26 I.C. 107 (108). If in the original lease there is a stipulation for renewal of the lease, and the tenant continues in possession after the expiry of the terms of the original lease, he must be deemed to be in possession under the renewal clause of the lease. The tenant continuing in possession under a stipulation for renewal of the lease stands on a different position from a tenant holding over (under sec. 116) merely by consent of the lessor, but if for any reason his agreement has to be disregarded (*e.g.*, for want of registration of the renewed lease) he can fall back upon the landlord’s mere consent and claim his rights under sec. 116—*Bengal National Bank v. Janoki*, 54 Cal. 813, 31 C.W.N. 973, 104 I.C. 484, A.I.R. 1927 Cal. 725 (727, 730).

616. Effect of holding over:—It is worthy of note that when a tenant holds over, the lease is renewed not in accordance with the terms of the original grant, but in accordance with the purpose for which the grant had been made—*Matilal v. Darjeeling Municipality*, 17 C.L.J. 167, 18 I.C. 844 (846). A tenancy created by holding over is a tenancy on the same conditions as those on which the original tenancy was created, subject only to the modification under this section that it would be a tenancy from month to month or from year to year according to the *purpose* for which the land was let—*Khuda Baksh v. Abid Husain*, 12 O.C. 279. This section lays down that in the absence of a contract to the contrary, the duration of the renewed lease shall be regulated according to the purpose of the lease, *irrespective of the term of the original lease*. Thus, if a lessee, under a lease (for non-agricultural purposes) granted for one year or for a term of years was allowed to hold over after the expiry of the term of

the lease, the renewed lease would not be a lease from year to year, but one from month to month under sec. 106, and terminable by 15 days' notice—*Matilal v. Darjeeling Municipality*, supra; *Troilokya v. Sarat Chandra*, 32 Cal. 123; *Gobinda v. Dwarka*, 19 C.W.N. 489 (492), 26 I.C. 962; *Durgi Nikarini v. Gobordhan*, 19 C.W.N. 525 (529), 24 I.C. 183; *Meghji Vallabhdas v. Dayali & Co.*, 48 Bom. 341 (344), 80 I.C. 507, A.I.R. 1924 Bom. 322; and this is so, even though after the expiry of the original term the rent was being paid per year and not from month to month—*Secy. of State v. Madhu Sudan*, 36 C.W.N. 918 (920). A tenant of homestead land within a town, holding over after the expiry of a ten years' lease, must be deemed a monthly tenant, and not entitled to six months' notice—*Mannatha v. Peary Mohan*, 23 C.W.N. 596, 52 I.C. 180. Where a tenant took a lease for 10 years from the *mutwalli* of a mosque with a covenant for renewal, and it was found that the covenant for renewal was *ultra vires*, the tenant holding over must be deemed to be holding on a monthly tenancy—*Gajendra Nath v. Ashraf Hossain*, 27 C.W.N. 159, A.I.R. 1923 Cal. 130, 69 I.C. 707. If the lease is granted for agricultural purposes, the tenant holding over after the expired lease will be deemed to hold from year to year—*Fakira v. Leakut Hussain*, 18 C.W.N. 858, 23 I.C. 318; *Administrator-General v. Asraf Ali*, 28 Cal. 227; *Ram Prosad v. Debi Prasad*, 49 I.C. 974 (Cal.); *Stonewigg v. Kameshwar*, 11 P.L.T. 444, A.I.R. 1923 Pat. 340, 71 I.C. 1022; *Mahomed Ayejuddin v. Prodyot Kumar*, 25 C.W.N. 13, 61 I.C. 503. So also, if the original lease was for manufacturing purposes, the tenant holding over after the expiry of the lease will be deemed to hold over on a tenancy from year to year, and will be entitled to six months' notice—*Jacks & Co. v. Joosab Mahomed*, 48 Bom. 38 (41), A.I.R. 1924 Bom. 115.

But in all other respects, *viz.*, the rate of rent, rate of interest etc., the tenant continues to hold on the same stipulations as are mentioned in the original lease—*Kishore Lal v. Administrator-General*, 2 C.W.N. 303; *Krishna Chandra v. Nitya Sundari*, A.I.R. 1926 Cal. 1239; *Allah Bibee v. Joogul*, 25 W.R. 234. The new tenancy will be deemed to have commenced on the same day of the year as the original lease, and notice to quit shall be given accordingly—Woodfall's *Landlord and Tenant*, 17th Edn., p. 246; *Doe v. Samuel*, 5 Esp. 173. But in some cases governed by the Bengal Tenancy Act, it has been held that although the tenant agreed to pay interest at the rate of 75 per cent. per annum under the original lease (which was created before that Act came into operation), still if the lease expired after the passing of that Act, and the tenant continued to hold over, the landlord was not entitled to recover interest at more than 12½ per cent., that being the maximum rate fixed by the Bengal Tenancy Act (sec. 67)—*Administrator-General v. Asraf Ali*, 28 Cal. 227; *Ali Mamud v. Bhagbati*, 2 C.W.N. 525; *Alim v. Satis Chunder*, 24 Cal. 37.

117. None of the provisions of this chapter apply to leases for agricultural purposes, except in so far

Exemption of lease for agricultural purposes.

as the Local Government, * * * may, by notification published in the local official Gazette, declare all or any of such provisions to be so applicable in the case of all or any of such leases, together with, or subject to, those of the local law (if any) for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

Change:—The words “with the previous sanction of the Governor-General in Council” which occurred in this section have been omitted by the Devolution Act (XXXVIII of 1920).

617. Agricultural leases:—Before the passing of this Act, there was no distinction between agricultural and non-agricultural tenancies. See *Madhab Chand v. Bejoy Chand*, 4 C.W.N. 574. The distinction is for the first time recognised in this Act.

In exempting leases for agricultural purposes from the operation of Ch. V of the Transfer of Property Act, it was probably the intention of the Legislature to retain in force the special provision contained in the various Rent Acts passed prior to the T. P. Act, in respect of the agricultural leases dealt with in those Acts—*Broucke v. Chhatar Kumari*, 4 Pat. 404, 86 I.C. 597, A.I.R. 1925 Pat. 421.

Although agricultural leases are excepted from the operation of sections 106 to 116, still the provisions of those sections, being reproduced from the rules of English law, are of general application and rest on principle as well as authority, and therefore they may be applied to agricultural leases as rules of justice, equity and good conscience. The legislature has wisely refrained from making these sections applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages which it is undesirable to disturb. But in the absence of special reasons, there is no ground for applying a different rule in the case of agricultural leases—*Krishna Shetti v. Gilbert Pinto*, 42 Mad. 654 (660). See also *Kemalooti v. Muhamed*, 41 Mad. 629 (630); *Saldanha v. Subraya*, 30 Mad. 410; *Gangamma v. Bhommakka*, 33 Mad. 253; *Srinivasa v. Rangaswami*, 1 L.W. 858, 25 I.C. 812; *Narayan v. Krishna Rao*, 14 N.L.R. 188, 43 I.C. 970.

The primary meaning of “agriculture” is the cultivation of the ground (Century Dictionary); and in its general sense, it means the cultivation of the ground for the purpose of procuring vegetables and fruits for the use of man and beast, including gardening or horticulture and the raising or feeding of cattle and other stock. (Anderson’s Dictionary of Law). “Agriculture is the art or science of cultivating the ground including the preparation of the soil, the planting of seeds, the raising and harvesting of crops and the rearing, feeding and management of livestock” (Webster). In the Oxford English Dictionary, agriculture is defined as “the science and art of cultivating the soil, including the allied pursuits of gathering the crops and rearing livestock, tillage, husbandry and farming (in the widest sense)”. Following these definitions, it has been held by the Madras High Court that in this section, the word ‘agriculture’ is used in its more general sense as comprehending the raising of vegetables, fruits and garden products as food for man and beast, though some of them may be regarded in England as products of ‘horticulture’ as distinguished from ‘agriculture’—*Murugesu v. Chinnathambi*, 24 Mad. 421. In *Panadai Pathan v. Ramasami*, 45 Mad. 710 (714), A.I.R. 1922 Mad. 351, 70 I.C. 657, it has been held that the term agriculture should not be taken as limited to the raising of food product but should be interpreted in a wider sense so as to include cultivation of fibrous plants such as cotton, jute and linen and all plants used for dyeing purpose such as indigo, etc., and all timber

trees and flowering plants. In Bouvier's Law Dictionary, 'agriculture' is defined as the cultivation of the soil for food products or any other useful or valuable growths of the field or garden. In Wharton's Law Lexicon, it is defined as including horticulture, forestry and the use of land for any purpose of husbandry.

In *Seshayya v. Rajah of Pittapur*, 31 M.L.J. 214, 34 I.C. 730, and *Rajah of Venkatagiri v. Ayyapareddi*, 38 Mad. 738, the term 'agriculture' was defined as the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc. But this narrow definition was disapproved of in 45 Mad. 710.

A lease for *horticultural purposes* is on the same footing as an agricultural lease and is outside the scope of the T. P. Act and is governed by the Bengal Tenancy Act—See *Gopal Chandra v. Bhutnath*, 42 C.L.J. 520, A.I.R. 1926 Cal. 312 (313). Horticulture, which means the cultivation of gardens or orchards is a species of agriculture in its primary and more general sense—*Murugesu v. Chinnathambi*, 24 Mad. 421 (423). But the mere fact that in a lease for residential purposes, there is given a right to take fruit from the trees on the land and to plant other fruit trees and take their fruits, does not convert the lease into a lease for horticultural purposes—*Gopal Chandra v. Bhutnath*, supra.

A lease of lands for growing *casuarina* trees to be used as fuel is a lease for agricultural purposes—*Panadai v. Ramasami*, 45 Mad. 710. Contra—*Devaraja v. Ammani*, 3 L.W. 319, 34 I.C. 539.

A lease of a village or a portion of a village for the purpose of bringing it under cultivation is an agricultural lease—*Banamali v. Nihal Singh*, 48 I.C. 354. A lease of lands on which potatoes, grain, vegetables, etc., are growing is a lease of lands used for agricultural purposes—*King Emperor v. Allan*, 25 Mad. 627. So also, a lease of land for cultivation of roots falls under the same category—*Ibid.* So a lease of lands used for pasture; so also a lease of land as a yard for ploughing cattle, or as a habitation for agriculturists, or as a pasture for the ploughing cattle, or for the purpose of storing manure or growing plants to be used as manure for agriculture—*Murugesu v. Chinnathambi*, 24 Mad. 421. A lease of land for the cultivation of betel is, according to the usage and custom of the country, an agricultural lease within the meaning of this section—*Ibid.* A lease of a land for grazing purposes is an agricultural lease, in spite of the fact that portions of the land are still jungle and have not been brought under tillage—*Brojabashi v. Ramsankar*, 23 C.L.J. 638, 29 I.C. 834. A reclamation lease granted expressly for the purpose that the jungle and wild trees might be removed and the land brought under cultivation, is a lease for agricultural purposes within the meaning of this section, and it is immaterial whether the grantee did the work himself by his servants and hired labourers, or by under-tenants whom he settled on the land—*Jagdish v. Lal Mohan*, 13 C.L.J. 318, 7 I.C. 864. The cultivation of indigo is an agricultural purpose, but the manufacture of indigo cakes out of indigo plants cannot be said to be so—*Surendra v. Hari Mohan*, 31 Cal. 174 (176).

In *Kunhayan v. Haji Mayan*, 17 Mad. 98, it was held that the lease of a coffee-garden was not an agricultural lease; but that decision was held to be wrong by Shephard, J., in *Murugesu v. Chinnathambi*, 24 Mad. 421.

A lease cannot be called a lease for agricultural purposes, unless the primary object of the lease is cultivation or agriculture. Where an entire village was leased out to the lessee who was put in possession and autho-

rised to let out the land to tenants and make collections, but he was not to cultivate the lands himself; further, the lessee was not entitled to plant groves on the land, and was also to be responsible for the payment of Government revenues and cesses, *held* that it was impossible to say that the primary object of the transaction was agriculture. The mere fact that it was open to the lessee to cultivate any particular land if he so desired would not make the lease an agricultural one, because agriculture was the secondary and not the primary object—*Ballabha v. Murat Narain*, 48 All. 385, 95 I.C. 1048, A.I.R. 1926 All. 432. Where the land is a homestead land within a Municipality, in which there is a house which the tenant has enjoyed for a long time, the mere fact that in the record-of-rights some portions of the lands are shown as *bagan* lands does not necessarily indicate that the lease is one for agricultural or horticultural purposes, especially where the tenants are not shown to be agriculturists or cultivators—*Safar Ali v. Abdul Mojid*, 31 C.W.N. 282 (284), 100 I.C. 614, A.I.R. 1927 Cal. 279. A lease of land for building purposes and for establishing a coal depot is not a lease for agricultural purposes—*Raniganj Coal Association v. Judoonath*, 19 Cal. 489.

A lease of tank which does not appertain to an agricultural holding but is used only for the preservation and rearing of fish is not an agricultural lease—*Mahananda v. Mongala*, 31 Cal. 937; *Hari v. Wanu*, 11 N.L.R. 122, 31 I.C. 294. But a lease of a tank for rearing fish and of the banks of the tank for stacking grass for cattle and for grazing cattle, granted to persons who are agriculturists and use their cattle in cultivation, is a lease for agricultural purposes. The fact that part of the leased property is a tank to be used for the purpose of catching fish does not make any difference; for the water may be used by the cattle for drinking purposes. The lease is on the whole an agricultural lease—*Surendra v. Chandratara*, 34 C.W.N. 1063 (1066).

A patni lease is not a lease for agricultural purposes, as a patni lease is generally granted to a middleman with a view to his subletting which he generally does, and it is not the patnidar but his tenants who use the land for agricultural purposes—*Promotho v. Kali Prosanna*, 28 Cal. 744 (746). An *ijara* for the realisation of rent from the cultivating tenants is not a lease for agricultural purposes—*Satyaniranjan v. Sarajubala*, 33 C.W.N. 865 (870); affirmed, 33 C.W.N. at p. 872 (P.C.).

A lease of the right to receive the collections of a village is not a lease for agricultural purposes—*Jang Bahadur v. Eshan*, 5 O.C. 122.

CHAPTER VI.

OF EXCHANGES.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an “exchange.”

“Exchange” defined.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

618. Exchange and sale:—The difference between a sale and an exchange is this, that in the former the price is paid in money, while in the latter it is paid in another property by way of barter—*Samaratmal v. Gobind*, 25 Bom. 696. Sale is always for *price* which means money or the current coin of the realm; but no price is paid in an exchange, but one specific property is transferred for another. But payment of price may be made in *addition* to the transfer of property, by way of equality of exchange, and such payment does not make the exchange lose its character as such—*Turner v. Edgell*, 6 L.J. (N.S.) Ch. 201. In other words, in a transaction of exchange, money may be added to the property or goods to equalise the consideration. Thus, where an owner of a property transfers it partly in exchange for another property and partly for cash, the transaction is an exchange—*Nathu Mal v. Har Dial*, 97 P.R. 1900; *Qazi v. Sharfa*, 199 P.L.R. 1913, 19 I.C. 301 (302); *Bepu v. Maruti*, 3 N.L.R. 138; *Ismail Shah v. Saleh Muhammad*, A.I.R. 1925 Lah. 326, 86 I.C. 266.

Subject to these differences, the Legislature has put an exchange on the same footing as a sale in almost every respect, as shown by the provisions of sec. 118 (para 2) and sec. 120.

Exchange and partition:—A partition of joint property is not an exchange within the meaning of this section—*Satya Kumar v. Satya Kripal*, 10 C.L.J. 503, 3 I.C. 247. An exchange is a transfer of ownership while in a partition there is no *transfer* but a mutual arrangement between the parties. Therefore, where certain co-owners possessing an undivided share in several properties took by arrangement some specific properties instead of their shares in all the properties, the transaction was not an exchange but only a partition. It was a transaction by which the parties held in severalty the lands which had been previously held in common. It was not an exchange but a partition, and did not require to be effected by a registered instrument—*Gyannessa v. Mobarakannessa*, 25 Cal. 210 (213). In other words, an exchange is a transaction by which a party acquires a property in which he had *no interest before*; but in a partition the parties who *already* possess definite interests in the property, make a convenient arrangement between themselves for enjoyment of the property. Thus, where plaintiff and defendants were the joint owners of a certain property A, and plaintiff alone was the owner of another property B, and by an oral agreement plaintiff got the former property A in its entirety, and gave to the defendants his share in the other property B, *held* that the transaction was an exchange, in as much as the defendants acquired a property in which they had no share before, and was invalid not being in writing registered—*Raj Narain v. Khobdari*, 5 C.W.N. 724.

619. Transfer of ownership:—An exchange is a completed transfer and does not imply the contract to make a transfer. The Law Commissioners remark: "We should define exchange not as an agreement but as the fulfilment of an agreement by mutual transfer of dominion"—Law Commissioners' Report, 1879.

The mutual *transfer* of two things is an essential element in exchange. Thus, where the plaintiff and the defendant having obtained decrees against each other settled their differences by a compromise by which the former gave up certain *jotes* to the latter, and the decrees obtained by the plaintiff were set off against the decrees obtained by the defendant, and the parties gave up their claims under their respective decrees, it was held that the

transaction was not one of exchange, since there was *no transfer* of the decrees but only mutual set off of cross decrees, and the fact that to equalise the difference between the two decrees the plaintiff gave up some *jotes* to the defendant would not make any difference in the nature of the transaction—*Deno Nath v. Motimala*, 11 C.W.N. 342.

Where a tenant voluntarily surrendered certain lease-hold rights and took from the landlord the lease-hold rights of some other property, the transaction was not an exchange, because there was no mutual transfer of ownership between the two parties—*Waliul Hussan v. Gopal*, 6 C.W.N. 905 (911).

Where a husband transfers a land to his wife for her use during her lifetime and the wife gives up her right to future maintenance, the transaction is not an exchange, because the husband does not transfer the ownership of the land (but simply gives her a life interest in the property) and the wife also does not transfer the ownership of anything. She does not purport to transfer anything nor had she anything which she could transfer within the meaning of this section—*Madam Pillai v. Badrakali*, 45 Mad. 612 (618) (F.B.).

A *family arrangement* is not a *transfer* of ownership, and does not therefore come within the definition of exchange under this section—*Ram Gopal v. Tulshi*, 51 All. 79 (F.B.), 116 I.C. 861, A.I.R. 1928 All. 641 (643).

620. Instances of exchange:—Money may be exchanged for money. The change of currency notes for money is merely an exchange of money in one form for money in another form—*Empress v. Joggeshur*, 3 Cal. 379. A transfer of a Court-fee stamp on promise of a stamp of equal value being returned is not a sale (but an exchange)—*Kedar Nath v. Emperor*, 30 Cal. 921. Where a person assigned his equity of redemption in consideration of the assignee transferring to him the proprietary rights over certain other lands, *held* that the equity of redemption was not a “price” within the meaning of sec. 54, but was a “thing” under this section and the transaction was an exchange, not a sale. The word “thing” in this section does not include tangible things only, but intangible things as well, such as an equity of redemption—*Lachhman v. Fida Husain*, 18 O.C. 109, 30 I.C. 232 (233). Where a mortgagor who has mortgaged his properties A and B, sells the property A to the mortgagee in discharge of the whole debt, in consideration of the latter freeing the property B from the mortgage-lien, *held* that the transaction is a transfer of property in consideration of a discharge of debt and may be a sale or an exchange—*Ariyaputhira v. Muthukumaraswami*, 37 Mad. 423, 15 I.C. 343. If a house worth Rs. 1,500 is exchanged for land worth Rs. 500 and cash Rs. 500, the transaction is an exchange and not a sale—*Ismail v. Saleh Muhammad*, 7 Lah.L.J. 18, 86 I.C. 266, A.I.R. 1925 Lah. 326.

But where the consideration for a transfer of property is the forbearance on the part of the transferee to take certain legal proceedings, the transaction is not an exchange, because a right to sue or to take legal proceedings cannot be the subject of ownership—*Venkata Jagannadha v. Venkata Kumara*, 54 Mad. 163, 60 M.L.J. 56, A.I.R. 1931 Mad. 140 (143).

621. Exchange, how made:—“The effect of the provision in para 2 will be to render a registered assurance necessary in the case of an exchange of land worth one hundred rupees or upwards. Here again has been borne in mind the expediency of rendering the system of transfer of immoveable property as far as possible a system of public transfer”—Law Commissioners’ Report, 1879.

An exchange of immoveable property of Rs. 100 or upwards can only be effected by means of a registered instrument—*Chidambara v. Vaidilinga*, 38 Mad. 519 (521), 30 I.C. 408; *Shams Shah v. Hussain*, 145 P.W.R. 1909, 4 I.C. 1004.

Non-registration of document cured by part performance:—Under sec. 53A (newly inserted by the T. P. Amendment Act, 1929), if two persons exchange property worth Rs. 100 or upwards between each other, under a written document, but that document is not registered and the parties take possession of each other's property in pursuance of the exchange, neither party will be afterwards entitled to eject the other on the ground that the document has not been registered and has not passed any title. The non-registration of the deed of exchange will be cured by the doctrine of part performance, *i.e.*, by the act and conduct of the parties in delivering possession to each other. The principle of law has been thus stated: Though a transaction has been clothed imperfectly with legal formalities (*e.g.*, has not been registered), still equity will support the transaction if it has been acted upon by the parties, and it will then be effectually binding on the parties in spite of the fact that secs. 118 and 54 were not strictly complied with—*Salamat v. Masa Allah*, 40 All. 187, 43 I.C. 645 (following *Mahomed Musa v. Aghore Kumar*, 42 Cal. 801 (P.C.)). See also *Dada v. Bahiru*, 29 Bom.L.R. 1419, A.I.R. 1927 Bom. 627 (628).

It should be noted that sec. 53A applies to those cases in which there is a *document in writing* (though it is unregistered) and not to cases in which there is no document at all. In 29 Bom.L.R. 1419 and 40 All. 187 there was no written document at all; the exchange took place by parol agreement. Nevertheless the doctrine of part performance was applied. These cases were decided prior to the enactment of sec. 53A. Henceforth, the doctrine will not be applied unless there is a written document. In *Chidambara v. Vaidilinga*, 38 Mad. 519 (521), the Court refused to apply the doctrine of part-performance, because the exchange was made by *oral* transfer.

In *Ramanathan v. Ranganathan*, 40 Mad. 1134 (1164, 1165), the exchange was made in *writing* which was unregistered, but the Court strictly followed the provisions as to registration, and refused to give effect to the doctrine of part-performance. This ruling is no longer correct in view of sec. 53A.

But it is clear that the estoppel arising out of the equitable doctrine of part-performance will not create title in the plaintiff, and if he seeks to recover possession on the strength of his *title*, he cannot succeed when there has been no transfer by a registered deed such as is necessary under this section read with sec. 54—*Kalipada v. Fort Gloster Jute Co., Ltd.*, 31 C.W.N. 348, A.I.R. 1927 Cal. 365 (370), 100 I.C. 866. See Notes under sec. 53A at pp. 242-243 *ante*.

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in ex-

Right of party deprived of thing received in exchange.

119. If any party to an exchange or any person claiming through or under such party is by reason of any de-

Right of party deprived of thing received in exchange.

change, by reason of any defect in the title of the other party, is entitled at his option, to compensation, or to the return of the thing transferred by him.

fect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

Amendment:—This section has been redrafted by sec. 59 of the T. P. Amendment Act (XX of 1929) but no substantial amendment has been made. The following reasons have been stated:—

“This section relates to the rights of a party deprived of the thing received in exchange, but does not provide for the rights of *transferees* from such party. We propose to amend it on the lines of section 109 of the Indian Contract Act.

Further, the section, as it stands, gives a right to the transferee to claim compensation or the return of the thing transferred by him. Obviously, the thing transferred by him cannot be returned to him unless the other party is in possession of it. To provide for this we have at the end of the new section added the words ‘if still in the possession of such other party, etc.’”—*Report of the Special Committee.*

622. This section affirms in distinct terms that each party warrants his title to the things which he transfers. This rule is based on equity and good conscience and may apply to exchanges effected prior to this Act—*Balusu Veeraraghavalu v. Boppana*, 31 M.L.J. 380, 35 I.C. 92.

Contrary intention:—The provisions of this section do not apply if there is a contrary intention in the terms of the exchange. Thus, a deed of exchange recited as follows:—“If any claim or dispute arises, I hereby bind myself to settle it. If I do not so get the dispute settled, I bind myself to pay an amount not exceeding Rs. 401-8-6, at the rate of Re. 1-4-0 per kuli of land for lands going out of your possession,” and the plaintiff being ousted from the land he received by reason of defendant’s want of title, he sued to recover the land which he had given in exchange, *held* that the operation of this section was excluded by the express covenant in the document mentioned above, and that the defendant having expressly covenanted to compensate for the plaintiff’s ouster, all that the plaintiff was entitled to was compensation up to the amount specified in the document. The suit for recovery of possession must fail—*Subramania v. Saminatha*, 21 Mad. 69.

But a covenant saying that "neither party has after to-day any claim against the other contrary to the exchange, and whatever proprietary rights each had in his own land will be owned by the other party" is not a contract to the contrary. It is rather a recital of the legal incidents of an exchange, and does not exclude the operation of this section—*Salabat v. Abdul Rahaman*, 51 P.R. 1917, 41 I.C. 248.

623. Effect of defect in title:—The remedy provided by this section is available to a party, whether he loses the whole or a portion of the property obtained in exchange, through defect of title of the other party. And if the party loses a *portion* of the property, he must repudiate the *whole* transaction and claim to be placed in the position he was in before the exchange, *i.e.*, he must claim to recover the whole thing; he cannot seek to recover an equivalent portion of the lands he gave—*Veera Pillai v. Poonnambala*, 9 M.L.J. 137; *Salabat v. Abdul Rahaman*, 51 P.R. 1917, 41 I.C. 248.

But this section does not exclude the operation of sec. 43; so that if the party having a defective title afterwards acquires full title, the other party will be entitled to its benefit. Thus, A obtained a certain property from B in exchange. B at the time of exchange had only a half share in the property but he subsequently acquired the other half. *Held* that as soon as the title to the whole was perfected, the benefit thereof accrued to A. Though the assignment was of a defective title yet as the assignor afterwards acquired good title, the Court would make that good title available to make the assignment effectual—*Bhairab v. Jiban*, 33 C.L.J. 184, 60 I.C. 810.

120. Save as otherwise provided in this chapter, each party has the rights, and is subject to the liabilities, of a seller as to that which he gives, and has the rights, and is subject to the liabilities, of a buyer as to that which he takes.

Rights and liabilities of parties.

625. Rights and liabilities:—The rights and liabilities of the buyer and seller, so far as immoveable property is concerned, are set forth in sec. 55. If the property is moveable, the case will be governed by the new Sale of Goods Act, III of 1930.

The plaintiff, a cotton-dealer of Tuticorin, delivered certain quantity of cotton to the defendants, the owners of a cotton press, and according to the custom prevailing in Tuticorin the defendants were bound to give the plaintiff in exchange cleaned cotton of the like quality and quantity. The cotton was accidentally destroyed by fire. *Held* that since by delivery the ownership of the cotton had vested in the defendants, the loss would fall on them, and not upon the plaintiff—*Volkart v. Vettivela*, 11 Mad. 459.

This section implies the exchange of one property for another *property* and not for *money*. Having regard to the definition given in sec. 118, no question of money is involved in a transaction of exchange. Even if there be a stipulation to pay money in addition in order to make up the deficiency of the property, and that money remains unpaid, the other party cannot have any charge on the exchanged property for the money remaining unpaid, on the principle of sec. 55 (4) (b). He will only get a simple money-decree—*Krishna Nair v. Kundu Nair*, 1912 M.W.N. 535, 16 I.C. 109. So also, if the exchange-transaction turns out to be invalid,

no charge can arise as under sec. 55 (6) (b) for the value of land exchanged—*Chidambara v. Vaidilinga*, 38 Mad. 519 (522), 30 I.C. 408.

A right of pre-emption can be exercised only in a case of *sale* and not where the transaction amounts to an *exchange*—*Lachhman v. Fida Hussain*, 18 O.C. 109, 30 I.C. 232 (234). Where a *wajib-ul-arz* of a village contained a provision for pre-emption in case of a *sale* of any land in the village, *held* that the provisions of the *wajib-ul-arz* would not apply to an *exchange*, and therefore if S give a land to A in exchange for a land given by A to S, the co-sharers of A were not entitled to sue to pre-empt the land given by A to S. Section 120 T. P. Act lays down that each party to an exchange has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes. But these rights and liabilities are enforceable between the parties to the exchange *inter se*. Third persons cannot be substituted in the place of either of them, because they cannot give what does not belong to them—*Samar Bahadur v. Jit Lal*, 46 All. 359 (360), 76 I.C. 495, A.I.R. 1924 All. 390 (dissenting from *Bhagwan Singh v. Kharag Singh*, 4 A.L.J. 756). But where the language of the *wajib-ul-arz* was more general, and gave a right of pre-emption in case of transfer of *any* kind, the right of pre-emption was allowed in the case of an exchange—*Niamat Ali v. Asmat Bibi*, 7 All. 626 (F.B.). See also *Daryao v. Jahan Singh*, 31 All. 539.

121. On the exchange of money, each party thereby warrants the genuineness of the money given by him.

Exchange of money.

626. This section is based on the principle that payment of spurious money is no payment at all; and it applies only to spurious money and not to money depreciated by use and wear.

The aggrieved party is entitled to recover the money paid by him as upon a failure of consideration. Thus, if a man pays money for bank-notes which afterwards turn out to be forged, he is entitled to recover back the money—*Leeds and County Bank v. Walker*, 11 Q.B.D. 84; *Jones v. Ryde*, 5 Taunt. 487; *Eicholtz v. Banister*, 17 C.B. (N.S.) 708.

CHAPTER VII.

OF GIFTS.

122. “Gift” is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person called the donor, to another called the donee, and accepted by or on behalf of the donee.

“Gift” defined.

Acceptance when to be made. Such acceptance may be made during the lifetime of the donor, and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

627. Essentials of Gift:—Transfer—A gift is a *transfer* of ownership; and therefore where the owner of certain Government promissory notes endorsed them to his son but reserved to himself the right of enjoying the interest during his lifetime, and in his will treated them as his own, charging the income thereof with certain bequests to be paid after his death, *held* that it was really a *benami* transaction and that no gift was intended—*Nawab Ibrahim Ali Khan v. Ummat-ul-Zohra*, 19 All. 267 (P.C.). But where the plaintiff purchased a property for and in the name of the defendant who had rendered some service to him, and the defendant was thenceforth in possession of the property and received the rents and profits, *held* that the right inference from the facts was that the property was not held by the defendant *benami* for the plaintiff, but belonged to the defendant, it being intended as a gift to him for his services—*Ram Narain v. Muhammad*, 26 Cal. 227 (230, 231) (P.C.). See also *Ismail v. Hafiz*, 33 Cal. 773 (784, 785) (P.C.).

Where there has been a clear intention to make an out-and-out gift, but the intention has failed for want of transfer or any other cause, the Courts will not convert what was meant to be an out and out gift into a trust, and the donor will not be deemed a trustee of the property for the intended donee. The gift will fail—*Manchershaw v. Ardeshir*, 10 Bom.L.R. 1209; *Natha Gulab & Co. v. Scheller*, 25 Bom.L.R. 599, A.I.R. 1924 Bom. 88.

A *mere contract* to convey immoveable property by way of gift does not create an interest in the property in favour of the intended donee—*Dahyabhai v. Maharaj Bahadur Singh*, 1 P.L.J. 238 (245), 34 I.C. 482.

The creation or imposition of an easement is not a *transfer* of property, and does not amount to a gift—*Sital Chandra v. Delanney*, 20 C.W.N. 1158 (1163, 1164), 34 I.C. 450.

Property:—This chapter deals only with gifts of *tangible* property: and so a release of a security without consideration does not fall under this chapter: because, though the release of the security may be said to be a gift, still the gift is not one of tangible property—*Mahim Chandra v. Ram Daval*, 42 C.L.J. 582, A.I.R. 1926 Cal. 170.

This Chapter applies to both *moveable* and *immoveable* property.

‘Existing property’—The subject of gift must be actually in existence at the time of the gift. A donation cannot be made of anything to be produced *in future* (e.g., future revenues of a property)—*Amtulnissa v. Mir Nurudin*, 22 Bom. 489. See sec. 124.

“Voluntarily”:—When a gift is made, it must satisfactorily appear that the donor knew what he was doing and understood the contents of the instrument and its effect, and also that undue influence or pressure was not exercised upon him by the party in whose favour the gift is made—*Phul Chand v. Lakkhu*, 25 All. 358; *Sarba Mohan v. Manmohan*, 37 C.W.N. 149 (150). If the parties stand in a confidential relation to each other, a gift cannot be supported unless it can be shown to the satisfaction of the Court that the parties were substantially ‘at arm’s length’, i.e., that the donor had competent and independent advice, and was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing. In such a case, the law throws the burden of proving good faith on the donee—*Phul Chand v. Lakkhu*, 25 All. 358.

If gifts are made by a *pardanashin* lady, the strongest and most satisfactory evidence ought to be given by the party who claims under the deed

that the transaction was a real and *bona fide* one, and was understood by the lady, that she had opportunity to take independent advice and that she was a free agent and executed the deed of her own free will—*Mahomed Bakhsh v. Hosseini Bibi*, 15 Cal. 584 (P.C.); *Wazid Khan v. Ewaz Ali Khan*, 18 Cal. 545 (P.C.); *Khatija v. Ismail*, 12 Mad. 380; *Mariam Bibi v. Sakina*, 14 All. 8; *Hakim Muhammad v. Najiban*, 20 All. 447 (P.C.). See also Note 69 under sec. 7.

If the donor be an old and infirm woman, the burden will lie very heavily upon the donee to show that the deed of gift was voluntarily executed by her with the full knowledge of its contents, and that she did so without any pressure or solicitations which might amount to an exercise of undue influence on her—*Rajaram v. Khandu*, 14 Bom.L.R. 340, 15 I.C. 529. But where it was found that the donor was fully able to manage her own business and transacted all her business herself, and even went to the Court and to the Registration office in connection with litigation and registration of deeds, the mere fact that she was a very old woman with the natural infirmity incident to her age ought not to raise any presumption of undue influence in respect of a deed of gift executed by her—*Ismail Mussajee v. Hafiz*, 33 Cal. 773 (783) (P.C.).

Without consideration:—"The first condition of a gift, as distinguished from other alienations, is that it should be an act of mere liberality on the giver's part, in this sense that whatever may be his motive, the act is not done in obedience to any legal obligation, nor with the purpose of placing the donee under any legal obligation. It is an act therefore which imports a clear gain to the donee, an accession to his property which he could not have demanded and for which he cannot be compelled to make a return."—Shephard and Brown, 7th Edn., p. 444.

A gift is a transfer without consideration, and if there is any consideration in any shape, there is no gift. A promise to discharge the debts of the transferor is a good and valid consideration, and if a property is transferred in consideration of the transferee undertaking to discharge the debts of the transferor, the transaction cannot be treated as a gift—*Anrudh v. Lachhmi*, 50 All. 818, 26 A.L.J. 753, 117 I.C. 351, A.I.R. 1928 All. 500 (503). But consideration of love and affection or spiritual or moral benefit is not contemplated by this section. The word 'consideration' means valuable consideration, *i.e.*, consideration either of money or money's worth. A gift in lieu of conferring spiritual benefit to the donor is not a transfer with consideration, but is to be treated as a gift—*Debi Saran v. Nandalal*, A.I.R. 1929 Pat. 591 (593). A transfer of some lands to the transferee for services rendered by him during the illness of the transferor is a gift: see *Hiralal v. Gavrishankar*, 30 Bom.L.R. 451, 109 I.C. 149, A.I.R. 1928 Bom. 250 (251).

628. Who can be a donee:—The word "donee" in this section means an ascertained or ascertainable person or persons by whom or on whose behalf a gift can be accepted or refused. This section has no application to a gift to an unascertained number of persons, *e.g.*, the public—*Pallayya v. Ramavadhanulu*, 13 M.L.J. 364. A gift may be made to an idol, because according to Hindu Law an idol is regarded as a juridical person capable of holding property, though it is only in an ideal sense that the property is so held—*Jagadindra v. Hemanta Kumari*, 32 Cal. 129 (P.C.); *Bhupati Nath Smrititirtha v. Ramlal*, 37 Cal. 128 (F.B.). A

math, like an idol, is capable of accepting a gift—*Babajirao v. Lakshmandas*, 28 Bom. 215.

A gift to a *dharma* is not valid, as the word 'dharma' is too vague and indefinite for the Court to enforce the gift—*Devshunkur v. Motiram*, 18 Bom. 136; *Morarji v. Nenbai*, 17 Bom. 351; *Runchordas v. Parbati*, 23 Bom. 725 (P.C.).

629. Acceptance:—The gift must be *accepted* by the donee or by some one on his behalf. An offer without acceptance by the donee cannot complete the gift, though the donor may in fact believe that it was accepted—*Pudmanand v. Hayes*, 28 Cal. 720 (P.C.).

There must be something shewn to indicate an acceptance on the part of the donee; and as to whether there has been an acceptance and what constitutes acceptance depends upon the circumstances of each case. The acceptance may be signified by an overt act such as the actual taking possession of the property, or such acts by the donee as would in law amount to taking possession of the property where the property is not capable of physical possession. In the case of the donee being incapable of signifying his acceptance by reason of age or of his being an impersonal being, recognised by law as capable of being a donee, such as a Deity, the acceptance required by this section may be made on his behalf by somebody else competent to act as an agent—*Deosaran v. Deoki*, 3 Pat. 842 (848), 80 I.C. 980, A.I.R. 1924 Pat. 657. Acceptance does not mean *express* acceptance; it may be implied: but the rule of implied acceptance ought not to be extended so far as to hold (as under the English law) that the acceptance will be presumed unless dissent is shown. Such a construction is not permissible in view of the last line of the section which says that if the donee dies before acceptance the gift is void. This provision makes it impossible to hold that there is a presumption of acceptance immediately upon the gift, whether the gift is known or unknown to the donee—*Anandi v. Mohan Lal*, 54 All. 534, 137 I.C. 156, A.I.R. 1932 All. 444 (445). Acceptance will be presumed if there is possession, actual or constructive, by the donee. In case of Zamindari property, mutation of names means delivery of possession, and this is undoubtedly proof of acceptance—*Ibid.* In case of gift by husband to wife, the husband's act of taking steps to get mutation in the name of his wife amounts to delivery of possession to the wife, which means acceptance by the wife. The fact that the husband performed certain acts in respect of the property after the mutation did not show that the husband retained ownership in himself, because those acts must be presumed to be acts done by the husband *on behalf* of his wife.—*Ibid.*

Where the instrument of gift, duly executed and attested is handed over to the donee, and the donee accepts the same, it may constitute a sufficient acceptance of the gift within the meaning of this section—*Kalyanasundaram v. Karuppa*, 50 Mad. 193 (P.C.), 31 C.W.N. 509, 100 I.C. 105, A.I.R. 1927 P.C. 42, followed in *Venkat Subba v. Subba Rama*, 52 Bom. 313 (P.C.), 30 Bom.I.R. 827, 108 I.C. 367, A.I.R. 1928 P.C. 86.

Under this section, the acceptance may be made while the donor is still capable of giving, and during his lifetime. It is therefore unnecessary that the acceptance should take place immediately.

The acceptance may be made either by the donee himself or by any one on his behalf. A guardian may accept a gift on behalf of his ward. The father is competent to accept a gift made to his minor son. Thus,

where a minor's uncle, by a registered deed, made a gift of certain property to the minor, which was already in the possession of the minor's father, *held* that the gift to the minor was valid, as the possession of the father was the only mode in which the minor son could accept or exercise possession—*Joitaram v. Ramkrishna*, 27 Bom. 31 (40). In a Nagpur case it has been held that an acceptance of a gift may be made personally by a minor donee without the intervention of a guardian—*Ganeshdas v. Suryabhan*, 13 N.L.R. 18, 39 I.C. 46. A gift made to an idol may be accepted by the priest or the manager of the temple—*Jagadindra v. Hemanta*, 32 Cal. 129 (P.C.); *Deosaran v. Deoki*, 3 Pat. 842 (848), 80 I.C. 980, A.I.R. 1924 Pat. 657. Where a gift of a house was made to two minors, which was accepted by the donees' guardians, and since then the donees have been living in the house for 11 years, the mere fact that the donor retained the custody of the deed and kept the house in his name in the Municipal records and paid the taxes, does not show that the donor did not intend the gift to be acted upon—*Venkatramayya v. Nagamma*, 35 L.W. 233, 136 I.C. 343, A.I.R. 1932 Mad. 272 (275).

Registration of deed after donor's death:—This section only requires that the gift should be *accepted* during the life-time of the donor; it does not require that the gift should also be *registered* during his life-time. Therefore a gift of immovable property is not invalid merely because registration of the deed of gift may have taken place after the death of the donor—*Hardei v. Ramlal*, 11 All. 319 (F.B.); *Nand Kishore v. Suraj Prosad*, 20 All. 392; *Khashaba v. Chandrabhagabai*, 32 Bom. 441. See Note 634 under sec. 123.

123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid, or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

630. Scope of section:—The Allahabad High Court has laid down that this section applies to *religious* gifts, and in the absence of a registered deed of gift, the dedication of property to an idol is invalid—*Mannu Lal v. Radha Kishenji*, 36 I.C. 989 (All.). The Patna High Court likewise holds that the Hindu law in the case of gifts has been expressly abrogated by sec. 129, and a gift under the Hindu law must be made in accordance with sec. 123 by a registered document—*Debi Saran v. Nandalal*, A.I.R. 1929 Pat. 591 (593). But the Madras High Court holds that the Chapter relating to gifts can have no application to gifts by dedication, because a dedication to an idol is not a gift to a sentient being, but to God. Consequently, a dedication to a temple or idol of a small portion of the property on the occasion of a marriage or *sradh* ceremony need not be in writing registered, but may be made orally. But if it is made in writing, it must be registered. If the dedication is made by giving the property to the trustees of the temple, it must be in writing registered—*Ramalinga v.*

Sivachidambara, 42 Mad. 440 (442, 444). And it has been recently ruled by the Privy Council that a dedication of a portion of the family property (including immoveable property) for the purpose of a religious charity (e.g., for erecting a choultry or charity house for Brahmans) may, according to Hindu law, be validly made without any instrument in writing—*Gangi Reddi v. Tammi Reddi*, 50 Mad. 421 (P.C.), 52 M.L.J. 524, 31 C.W.N. 799, A.I.R. 1927 P.C. 80 (82), 101 I.C. 79. But this decision was given without any reference to the T. P. Act. The law is therefore unsettled on this subject. It should also be noticed that since the Transfer of Property Act contemplates only a transfer from one living person to another *living* person (sec. 5), a gift to an idol does not fall under this Act, (and need not be in writing registered) because an idol, though recognised in law as a juristic person, is not strictly speaking a living person—*Narasimhaswami v. Venkatalingam*, 50 Mad. 687 (F.B.), 53 M.L.J. 203, 103 I.C. 302, A.I.R. 1927 Mad. 636 (638); *Harihar v. Guru Granth Saheb*, 11 P.L.T. 658, 128 I.C. 791, A.I.R. 1930 Pat. 610 (612). Moreover, the new definition of living person' as given in sec. 5 does not include an idol.

This section does not apply to a grant of easement, because a grant or imposition of an easement does not amount to a transfer—*Sital Chandra v. Delanney*, 20 C.W.N. 1158 (1163, 1164), 34 I.C. 450.

This section does not apply to a *partition*, for partition is not a gift, and no writing or registration is necessary to effect it—*Laxman v. Tayya*, 51 I.C. 93, 15 N.L.R. 93; *Ma Sein v. Maung U.*, 25 I.C. 498. At a partition between the members of a joint Hindu family consisting of a father and his sons, they purported to include the second defendant who was admittedly not a member of the joint family, and to allot to him a proportionate share of the joint properties. There was, however, no registered instrument though the property allotted was over Rs. 100 in value. *Held* that the transaction, by which a portion of the property was given to a person who was not a member of the family, was a gift and not a partition, and not being made by a registered instrument, was invalid. The parties cannot evade the formal requirements of the Transfer of Property Act by calling a transaction by a different name—*Marc Gouda v. Chenne Gouda*, 49 M.L.J. 150, A.I.R. 1925 Mad. 1174, 90 I.C. 131.

This section does not affect the essential ingredients of a complete gift set forth in section 122 (*viz.*, voluntary giving by the donor and acceptance by the donee) but only provides a further safeguard by requiring a gift of immoveable properties to be effected by a registered instrument. The provision in sec. 123 does not purport to legislate that the registration of a deed of gift in respect of an immoveable property is a sufficient transfer of the property. And so, it must be proved in each case, apart from the registration of the document, that there was a complete *divesting of ownership*, i.e., that the donor had voluntarily and without consideration transferred the property to the donee, and that there was an *acceptance* on the part of the donee. Therefore the registration of a deed of gift is not sufficient to constitute a gift where it is found that in spite of the registration the donor continued to be in possession of the property—*Deosaran v. Deoki Bharathi*, 3 Pat. 842 (849), 80 I.C. 980, A.I.R. 1924 Pat. 657. Therefore, if, in spite of the registration and delivery of the deed of gift, it appears that the donor *never intended* to give effect to the deed and had not done all he could do to complete the gift, but had remained in possession, to which the donee never objected, and the

donor subsequently sold the property to other persons, *held* that the gift was not complete inspite of registration of the deed—*Lakshimoni v. Nittyananda*, 20 Cal. 464.

631. Hindu law:—Although the Hindu Law requires delivery of possession to complete a gift of immoveable property, that law has been abrogated by sec. 123 of this Act. This section clearly seems to have the effect of rendering unnecessary the delivery of possession, substituting, as it does, registration for delivery of possession—*Phul Chand v. Lakkhu*, 25 All. 358; *Pahlwan Singh v. Ram Bharose*, 27 All. 169; *Lallu Singh v. Gur Narain*, 45 All. 115 (F.B.), A.I.R. 1922 All. 467, 68 I.C. 798; *Balmakund v. Bhagwan*, 16 All. 185; *Kali Das v. Kanhaiyalal*, 11 Cal. 121 (P.C.); *Dharmodas v. Nistarini*, 14 Cal. 446; *Balbhadra v. Bhowani*, 34 Cal. 853 (858); *Madhab Rav v. Kasi Bai*, 34 Bom. 287; *Bai Rambai v. Bai Moni*, 23 Bom. 234; *Alabai Koya v. Mussa Koya*, 24 Mad. 513 (522); *Debi Singh v. Bansidhar*, 66 I.C. 480, A.I.R. 1922 All. 44; *Bhagwan v. Hari Singh*, 22 N.L.R. 124, A.I.R. 1925 Nag. 199, 83 I.C. 41; *Nandra v. Chandi*, 5 O.C. 98. So also, a gift of moveable property may be made simply by a registered instrument without delivery of property—*Dharmodas v. Nistarini*, 14 Cal. 446.

Since delivery of possession is not necessary, it follows that if a Hindu executes a gift *in praesenti* of three villages by means of a duly registered instrument but reserves possession of the villages in order to enjoy the usufruct during his lifetime, and at the same time provides that he would not alienate the property to any body else, the gift is perfectly valid—*Lalu Singh v. Gur Narain*, 45 All. 115 (F.B.) A.I.R. 1922 All. 467, 20 A.L.J. 744; and if the donee dies during the life-time of the donor, the ownership of the properties (though not the immediate possession thereof) would pass to the donee's heirs—*Ibid*.

Where a deed of gift was duly made, registered and accepted, the mere fact that the deed of gift remained with the donor did not make the gift any the less complete—*Amrithammal v. Ponnusami*, 17 M.L.J. 386.

632. Muhammadan law:—Under the Mahomedan law, the essentials of a gift are, a declaration of gift by the donor, an acceptance of the gift by the donee, and delivery of possession such as the subject of the gift is susceptible of. This rule of Muhammadan law is unaffected by the provisions of sec. 123 T. P. Act (see sec. 129 *infra*), and consequently a *registered instrument is not necessary* to validate a gift of immoveable property—*Ali Bakhsh v. Ghurai*, 18 O.C. 122, 28 I.C. 180 (181).

Delivery of possession being essential to the validity of a gift, it follows that if there is no delivery of possession, there is no valid gift—*Sadik Hussain Khan v. Nawab Syed Hasim Ali*, 38 All. 627 (645, 647, 657) (P.C.); *Chaudhri Mehdi Hasan v. Mahomed Hasan*, 28 All. 439 (P.C.). Even a registered deed of gift is not effectual under the Mahomedan law, if it is not accompanied by delivery of possession—*Mogulsha v. Mahomed Saheb*, 11 Bom. 517; *Ismail v. Ramji*, 23 Bom. 682; *Vahazulla v. Boyapati*, 30 Mad. 519; *Mohinuddin v. Manchershaw*, 6 Bom. 650; *Meheradi v. Tajuddin*, 13 Bom. 156; *Nizamuddin v. Abdul Guffur*, 13 Bom. 264; *Rahim Baksh v. Sajjad Ahmad*, 19 C.W.N. 1311, 26 I.C. 466; *Rahimjan v. Imanjan*, 17 C.L.J. 173, 15 I.C. 698 (700).

Under the Mahomedan law, a valid gift can be effected by delivery of possession, and if there is delivery of possession, the mere fact that

there is *also an unregistered deed* of gift does not make the gift invalid. The gift was complete as soon as there was delivery of possession, and the unregistered instrument of gift should be left out of consideration—*Nasib Ali v. Wajed Ali*, 44 C.L.J. 490, 100 I.C. 296, A.I.R. 1927 Cal. 197 (198); *Ali Bakhsh v. Ghurai*, 18 O.C. 122, 28 I.C. 180 (182). So also, if a gift takes place by delivery of possession, and there is also a deed of gift, but that deed is *not duly attested*, the gift is nevertheless valid. The gift is complete by delivery of possession. It is immaterial that there is an instrument in writing and that it has not been properly attested. The provisions of sec. 129 as to execution of a deed of gift and attestation do not apply to Mahomedans—*Karam Ilahi v. Sharfuddin*, 38 All. 212 (213), 35 I.C. 114.

Gift by a Mahomedan to a Hindu:—Under the Mahomedan law, a Mahomedan can make a valid gift to a Hindu, and such a gift is governed by the rule of Mahomedan law, and not by the Hindu law. Sec. 123 does not apply to the case, and consequently, an oral gift of immoveable property made by a Mahomedan to a Hindu, if made simply by delivery of possession, is valid. No registered deed is necessary—*Tabera v. Ajodhya*, A.I.R. 1929 Pat. 417 (419).

633. Buddhist law:—It has been recently held that although the rule of Buddhist law requires delivery of possession as essential to the validity of a gift, such rule is abrogated by the provisions of the Transfer of Property Act, just as this Act has abrogated the rule of Hindu law as to the necessity of delivery of possession—*U. Pandwan v. U. Sandima*, 2 Rang. 131 (134), 83 I.C. 557, A.I.R. 1924 Rang. 309; *Mi Hla Zan v. Pa Pa Ye*, 3 Bur.L.J. 111, A.I.R. 1924 Rang. 353.

Under the Buddhist law, delivery of possession is necessary to the validity of a *donatio mortis causa*—*Maung Ba v. Maung Pyu*, 40 I.C. 854.

634. Registration:—It is not necessary for the validity of a deed of gift that it should be registered by the donor himself. Where a Hindu executed a deed of gift in favour of his wife and died, and the deed was subsequently registered at the instance of the widow, *held* that it was a valid deed of gift within the provisions of this section—*Bhabotosh v. Soleiman*, 33 Cal. 584. Nor is it necessary that the registration should take place during the lifetime of the donor. A gift of immoveable property is not invalid merely because the deed of gift may have been registered after the death of the donor—*Hardei v. Ramlal*, 11 All. 319; *Nand Kishore v. Surja Prosad*, 20 All. 392; *Kashaba v. Chandrabhagabai*, 32 Bom. 441. The *post mortem* registration of a deed of gift by the legal representative of the donor has the same effect as its registration by the donor himself during his lifetime—*Meiyyalu v. Anjalay*, 25 Mad. 672; *Kashaba v. Chandrabhagabai*, 32 Bom. 441. If the donor dies after executing the deed of gift, and the donee does not take any steps to register the deed, the gift fails. See *Hiralal v. Gavrishankar*, 30 Bom.L.R. 451, A.I.R. 1928 Bom. 250.

A deed of gift registered *against the wishes of the donor* is valid. And so, where the donor executed a deed of gift and handed over the deed to the donee, and the latter proceeded to register the deed, the donor could not bring a suit for injunction against the donee to restrain him from registering the deed. Once the deed is executed and handed over to the donee, the gift is complete—*Venkat Subba v. Subba Rama*, 52 Bom. 313

(P.C.), 32 C.W.N. 708, 108 I.C. 367, A.I.R. 1928 P.C. 86 (87). The defendants induced the plaintiff to execute a deed of sale but they got a deed of gift written, and the plaintiff on knowing that it was a deed of gift refused to have it registered, whereupon the defendants applied to the Registering Officer, and procured its registration by order of that Officer against the wishes of the donor. *Held* (leaving aside the question of fraud in getting a deed of gift executed instead of a deed of sale, for which the plaintiff had a separate remedy) that a "gift duly made and accepted is not invalid merely because it was registered afterwards against the wishes of the donor. Registration is not an act of the donor, but the act of an officer appointed by law to register documents. A document need not even be presented for registration by the executant. Consent to the registration of the deed is not a part of the gift. The term *registered* instrument does not necessarily mean an instrument registered at the instance of or with the consent of the donor"—*per* Chamier, J. in *Parbati v. Baijnath*, 9 A.L.J. 300, 14 I.C. 61, upheld on appeal in *Parbati v. Baijnath*, 35 All. 3, 16 I.C. 406. In Madras, it was once held that a deed of gift registered against the wishes of the donor was not valid, and not sufficient to complete the gift—*Ramamirtha v. Gopala*, 19 Mad. 433 (435); it was further held that a deed of gift registered after the death of the donor against the wishes of the legal representatives of the deceased donor was ineffective and did not pass the property—*Dasi Svarnam v. Deivanayagam*, 28 M.L.J. 378, 28 I.C. 271; but both these cases have been overruled by a Full Bench which has decided that there is nothing in sec. 123 which requires the *donor* to have the deed registered; all that is required is that he should have signed the instrument, and once it is duly executed, the Registration Act allows it to be registered even though *the donor may not agree* to its registration, and upon registration it would take effect from the date of execution. Consequently, a deed of gift can be registered by the donee after the death of the donor *without the consent of the legal representative* of the donor—*Venkati Rama Reddi v. Pillati Rama Reddi*, 40 Mad. 204 (211) (F.B.).

The law on this subject has been thus stated by their Lordships of the Judicial Committee: "When the instrument of gift has been handed over by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death nor the express revocation by the donor is a ground for refusing registration, if the other conditions are complied with"—*Kalyanasundaram v. Karuppa*, 50 Mad. 193 (P.C.), 52 M.L.J. 346, 100 I.C. 105, 31 C.W.N. 509, A.I.R. 1927 P.C. 42; *Venkat Subba v. Subba Rama*, 52 Bom. 313 (P.C.), 30 Bom.L.R. 827, 32 C.W.N. 708, 108 I.C. 367, A.I.R. 1928 P.C. 86 (87).

A deed of gift of immoveable property executed in accordance with the terms of sec. 123, but *never communicated* to the intended donee and remaining in the possession of the donor undelivered, would not come within the ruling of the Full Bench in 40 Mad. 204, and cannot be compulsorily registered at the instance of the donee—*Kalyana Sundaram v. Karuppa*, *supra*.

635. Oral gift or unregistered deed of gift:—According to the Allahabad High Court, the provisions of this section are mandatory and imperative, and no gift of immoveable property can be made except by means of a registered instrument. An oral gift (*e.g.* a gift by way of *sankalpa* at the time of nuptials) cannot operate as a valid gift of immoveable property. It cannot divest the donor of his proprietary rights in the property or clothe the donee with any title to the same. The donor must be taken, in the eye of the law, to continue to remain the owner of the property—*Hira Mani v. Anmol*, 26 A.L.J. 944, A.I.R. 1928 All. 699 (702), 117 I.C. 351. Where the plaintiff consented to make a gift of land to the defendant (a municipality) but there was no registered deed of gift, the Bombay High Court held that the oral gift was not complete in law, and the fact that the municipality occupied the land and constructed a road on it did not give validity to the transaction—*Kuverji v. Municipality of Lonavela*, 45 Bom. 164, 58 I.C. 403, 22 Bom.L.R. 654. An oral gift is not valid, even if the donee executes a document in favour of the donor acknowledging the oral gift—*Girija Prasad v. Purshottam*, 28 Bom.L.R. 421, A.I.R. 1926 Bom. 261, 94 I.C. 609. If there is an oral gift, followed by delivery of possession, and then the donor executes a deed of gift but dies before he can register it, *held* that there is no valid gift—*Hiralal v. Gaurishankar*, 30 Bom.L.R. 451, A.I.R. 1928 Bom. 250 (251), 109 I.C. 149. The Madras High Court similarly holds that where there was no deed of gift, but the donor merely presented to the Collector a petition reciting that he had given certain villages to the donee and praying that an order be made transferring the villages to the donee's name, and on the same date the donee also presented a petition to the Collector reciting the gift of the villages and asked for the transfer of them to his name on the register, *held* that as there was no deed of gift in writing registered, the mere recitals in the petition could not be used as evidence of the gift—*Varada Pillai v. Jeevarathnammal*, 43 Mad. 244 (249) (P.C.). But the Rangoon and Calcutta High Courts lay down a more equitable principle. Thus, the Rangoon High Court is of opinion that where an immoveable property was transferred with possession orally as a gift and the donor allowed the donees in possession to deal with it as their absolute property (*e.g.* to mortgage it, to re-mortgage it, to purchase other properties with the proceeds of the mortgages), the donor would not be allowed to take advantage of the non-registration of the gift and to take back the property. To allow the donor to do so would be to permit this Act to be used to perpetrate a fraud in a manner which could not be recognised—*Ma Htay v. U. Tha Hline*, 2 Rang. 649 (652, 653), 88 I.C. 66, A.I.R. 1925 Rang. 184. Where the donor made an oral gift of certain lands, and reported to the revenue authorities for effecting a mutation in the name of the donee, and the donee was in possession since the date of the gift, *held* that though the gift did not convey any title to the donee, by reason of not being made by a registered deed, still as the donor had clearly divested himself of the ownership of these lands, neither the donor nor any person claiming through him was entitled to bring a suit to take back the properties, and the donee could resist the suit on the ground of estoppel—*M. P. L. M. P. Chetty v. Ma Ngwe Sin*, 1 Rang. 665, 79 I.C. 485, A.I.R. 1924 Rang. 200 (201); *Ma Shin v. Maung Hman*, 1 Rang. 651, A.I.R. 1924 Rang. 102 (103), 79 I.C. 579. Similarly, where in pursuance of an ante-nuptial agreement, a father made a gift of his house to his daughter and put her in possession, under an unregistered deed,

and she held such possession for a number of years, and the donor afterwards sued for recovery of possession of the house, *held* that the donor was estopped from bringing the suit—*Pran Mohan v. Hari Mohan*, 52 Cal. 425, 29 C.W.N. 889 (891), A.I.R. 1925 Cal. 856 (following *Mahomed Musa v. Aghore Kumar*, 42 Cal. 801 P.C.).

If, under the oral gift, the donee remains in possession for *more than 12 years*, his title will be perfected by adverse possession, and it will not be in the power of the donor to take back the property—*Varada Pillai v. Jeevarathnammal*, 43 Mad. 244 (250) (P.C.).

Part performance:—The doctrine of part performance applies only when the agreement is capable of specific enforcement. An agreement to make a gift is not capable of specific performance, and the above doctrine has no application. Therefore where there is an oral gift followed by delivery of possession, the donee cannot rely on the doctrine of part performance in order to resist a suit for recovery of possession brought by the donor or his representatives—*Hiralal v. Gaurishankar*, 30 Bom. L.R. 451, 109 I.C. 149, A.I.R. 1928 Bom. 250 (252); *Hira Mani v. Anmol*, 26 A.L.J. 944, A.I.R. 1928 All. 699 (703), 117 I.C. 351. The positive enactment of this section as regards registration cannot be ignored or overridden by any rule of equity (*e.g.* the rule of part performance)—*Hira Mani v. Anmol*, *supra*. It should also be noted that the rule of part performance enunciated in the new section 53A does not apply to a gift, because that section applies only to a transfer *for consideration*.

But the Calcutta and Rangoon High Courts have applied the doctrine of equitable estoppel in such cases. See 52 Cal. 425, 1 Rang. 651 and 1 Rang. 665 cited above.

635A. Non-delivery of possession:—Though delivery of possession is not essential to the validity of a gift of immovable property, still the withholding of possession may, under the circumstances of the case, lead the Courts to presume that the gift was merely a colourable transaction and that there was no intention to pass title. Thus, where a deed of gift of immovable property was secretly executed by a person in favour of his wife at a time when the failure of the firm of which the donor was a partner was in sight, if not actually imminent, and the gift was kept secret till the firm had been declared insolvent, and it was found that the donee never obtained possession of the property, *held* that the title did not pass from the donor to the donee—*Official Assignee v. Bidyasundari*, 24 C.W.N. 145, 54 I.C. 700.

Signed:—The deed of gift must be signed either by the donor himself or by some one on his behalf. As to what is or is not a valid signature, see the analogous cases of mortgage cited in Note 350 under sec. 59.

636. Attestation:—See the new definition of 'attested' in sec. 3 added by the T. P. Amendment Act XXVII of 1926. Prior to this definition it was held that the attesting witness must see the executant sign the deed of gift; if the attesting witnesses did not see the execution but merely heard from the executant an acknowledgment that he had executed the deed, there was no valid attestation—*Saheda v. Raja Ram*, 11 A.L.J. 757, 21 I.C. 83; *In re Velavapalatti Peda*, 9 M.L.T. 57, 8 I.C. 887; *Baijnath v. Biraj Koer*, 2 Pat. 52 (61); *Amarappa v. Raghav*, 44 Bom. 231. These decisions are no longer of any authority in view of

the new definition of 'attested' in sec. 3. See Note 18A under sec. 3 and compare Note 353 under sec. 59.

The Calcutta and Allahabad High Courts as well as the Oudh Chief Court are of opinion that an attesting witness, if he is illiterate, can put his mark to the instrument, and this would be sufficient attestation. See *Sashi Bhushan v. Chandra*, 33 Cal. 861; *Lal Bahadur v. Rameshwar*, 3 Luck. 113, A.I.R. 1927 Oudh 510 (511); *Chiranji Lal v. Purna*, 12 A.L.J. 1114, 26 I.C. 84. But the Madras High Court is of opinion that under the new definition of 'attested' in sec. 3, which is taken from sec. 63 (old sec. 50) of the Indian Succession Act, attestation by mark is not a valid attestation. This definition enables the executant to "sign or affix his mark" to the instrument, but uses no such alternative expression in the case of witnesses but simply speaks of their having "signed" the instrument. The conclusion is that the attesting witnesses must *sign* the document, and a person who cannot sign his name is not competent to attest a document by means of a mark—*Venkataramayya v. Nagamma*, 35 L.W. 233, 136 I.C. 343, A.I.R. 1932 Mad. 272 (274). See also *Nityagopal v. Nagendra*, 11 Cal. 429 (relating to a will).

The scribe may be an attesting witness; and it is not necessary that he should add the word 'witness' after his signature. Though *prima facie* the scribe's signature on a deed is not that of an attesting witness, still if there is sufficient evidence to show that he signed not as a writer but as an attesting witness after the execution of the document, there is no reason why he should not be considered as one of the attesting witnesses—*Ma Kin v. Maung Kya*, 10 Bur.L.T. 106, 36 I.C. 275. This subject is elaborately discussed in Note 352 under sec. 59.

Since this section does not apply to Mahomedans, a deed of gift executed by a Mahomedan would be valid even if it be not validly attested according to the requirements of this section—*Karam Ilahi v. Sharfuddin*, 38 All. 212 (213), 35 I.C. 114. But of course there should be delivery of possession.

637. Gift of moveable property:—A gift of moveable property may be effected either by a registered deed or by delivery of the property: and before the thing is actually delivered or a deed of gift executed and registered, the property does not vest in the donee. Where therefore a bonus was granted by a Railway Company to a certain person, and before it was paid to him it was attached in execution of a decree obtained against him, *held* that the property was not yet at the disposal of the donee and could not be attached in execution of the decree against him—*Janki Das v. E. I. Ry. Co.*, 6 All. 634; *Natha Gulab v. Scheller*, 25 Bom.L.R. 599, 87 I.C. 312, A.I.R. 1924 Bom. 88.

If the subject of gift is already in the possession of the donee, formal delivery of possession is not possible. The donor may make a declaration of gift in his favour, leaving him in possession of the thing, and such declaration is sufficient delivery—*Bai Kushal v. Lakshmana*, 7 Bom. 452. "The delivery need not be made at the time of the gift. Delivery first and gift afterwards is as effectual as gift first and delivery afterwards. Therefore, where a chattel of one person is already in the possession of another, though not for the purpose of an intended gift, an effectual verbal gift of it to the latter may be made without any further delivery to him"—Halsbury's *Laws of England*, Vol. 15, p. 412. Where the thing is in the hands of a third person, the donor's request to such person to deliver is the only delivery possible.

If both moveable and immoveable properties are made the subject of gift, and the gift is invalid in respect of the immoveable properties (*e.g.* for want of a registered deed) it would not be a ground for dismissing the claim as regards the moveables, because the gift of the latter was not conditional on the gift of the former—*Perumal v. Perumal*, 44 Mad. 196 (204), 40 M.L.J. 25, 61 I.C. 461.

Under the third para, the delivery of moveable property may be made in the same manner as goods may be delivered. As to how delivery of goods may be made, see section 33 of the Sale of Goods Act (III of 1930) which runs as follows: "Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf." In England, the law is thus stated: "Actual manual delivery by the donor to the donee is not however essential to complete the gift thereof. It is sufficient if the donee be put by the donor in possession of the chattels. Where chattels cannot be actually delivered owing to their bulk, they can be constructively delivered, *e.g.* by delivery of the key of the warehouse in which they are stored."—Halsbury's *Law of England*, Vol. 15, p. 412.

Under the English law, if a money is deposited in a Bank by the husband in the name of his wife, it is presumed that the deposit is intended for her advancement. But this rule does not hold good in India, and such a deposit would not amount to a gift of the money to the wife, because there is no *delivery* of the money to her—*Paul v. Nathaniel*, 1931 A.L.J. 417, 132 I.C. 573, A.I.R. 1931 All. 596.

638. Gift when takes effect:—A gift takes effect from the date of execution of the deed of gift and not from the date of its registration—*Venkat Subba v. Subba Rama*, 52 Bom. 313 (P.C.), 30 Bom.L.R. 827, A.I.R. 1928 P.C. 86 (87), 108 I.C. 367. Thus, where a person executed a deed of gift in favour of a charity on the 9th September, adopted a son on the 10th and registered the deed on the 15th, *held* that the gift was complete on the 9th, and the adopted son had no claim to the properties comprised in the gift, though the deed was registered subsequent to his adoption—*Kalyansundaram v. Krishnaswami*, 11 L.W. 187, 62 I.C. 280; *Kalyanasundaram v. Karuppa*, 17 L.W. 232, 73 I.C. 206, A.I.R. 1923 Mad. 282; *Kalyanasundaram v. Karuppa*, 50 Mad. 193 (P.C.), 52 M.L.J. 346, 100 I.C. 105, 31 C.W.N. 509, A.I.R. 1927 P.C. 42. In other words, a gift takes effect, as soon as the instrument of gift, duly executed and attested is handed over to the donee, and the gift has been accepted by the donee. The view once taken by the Madras High Court in *Ramamirtha v. Gopala*, 19 Mad. 433 (434) that a gift is not complete until it has been registered and that it operates only upon registration has been overruled by *Venkat Rama Reddi v. Pillati Rama Reddi*, 40 Mad. 204 (211) (F.B.), where it is distinctly laid down that upon registration the gift takes effect from the *date of its execution*.

Imperfect gift—Trust:—Where there has been a clear intention to make a gift, but on account of an omission to comply with the requirements of this section or through any other cause, the gift has failed, the Court will not convert what was intended to be an out-and-out gift into a trust. The gift will fail altogether—*Manchershaw v. Ardesbir*, 10 Bom. L.R. 1209. Thus, a Railway Company sanctioned a gratuity of Rs. 7700 to the defendant, a retired employee, but before the money was remitted

to him, the plaintiff in execution of a money decree against the defendant attached the sum. *Held* that the money not having been delivered to the defendant at the date of attachment, there was no complete gift of the amount to the defendant, and the attachment of the money as the property of the defendant was inoperative. Even the incomplete transfer would not constitute the donor a trustee of the property for the intended donee; in other words, the imperfect gift will not be construed as a declaration of trust—*Natha Gulab & Co. v. Scheller*, 25 Bom.L.R. 599, A.I.R. 1924 Bom. 88, 87 I.C. 312.

Gift of existing and future property.

124. A gift comprising both existing and future property is void as to the latter.

639. This section is an explanation of sec. 122 which lays down that a gift is a transfer of an *existing* moveable or immoveable property. There can be no alienation of a thing not in existence. Thus, where a gift was made of "all my present and future personalty," it was held that the transfer was good as to the property of the transfer existing at the date of execution of the deed, but bad as to the after-acquired property—*Belding v. Read*, 3 H. & C. 955; *Holroyd v. Marshall*, 10 H.L.C. 199; *Tadman v. Epineuil*, 20 Ch. D. 758.

A gift of future property is a mere promise which cannot be enforced and is therefore void. When a gift rests merely in promise or unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor or those claiming under him to complete and perfect it—*Forrest v. Forrest*, (1865) 11 L.T. 763.

125. A gift of a thing to two or more donees of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Gift to several, of whom one does not accept.

640. When a gift is made to two or more persons, this section intends that the donees would take the property as tenants-in-common, each donee getting a distinct share in the property, and the non-acceptance by one of the donees would make the gift void only in respect of his intended share. This section lays down that a gift is personal to the donee, and therefore if a gift is made to two persons jointly and one of them does not accept it, the other cannot take the whole by survivorship. The English law, however, lays down a contrary rule: "If an estate is limited to two persons jointly, the one capable of taking and the other not, he who is capable of taking shall take the whole"—*per* Lord Hardwicke in *Humphrey v. Tayleur*, (1752) 1 Amb. 138.

The above rule of English law was applied by the Privy Council in a case of gift executed prior to the passing of this Act. Thus, where a gift was made by a widow to her daughter and the daughter's husband jointly, and the gift was invalid as to the husband (owing to a custom of the village as to the right of inheritance) *held* that the daughter took the whole estate—*Nandi Singh v. Sita Ram*, 16 Cal. 677 (682) (P.C.).

126. The donor and donee may agree that, on the happening of any specified event which does not depend on the will of the donor, a gift shall be suspended or revoked; but a gift, which

When gift may be suspended or revoked.

the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a) A gives a field to B, reserving to himself, with B's assent, the right to take the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself with B's assent the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

641. Revocation:—The first para lays down the conditions under which a gift may be revoked under an agreement between the donor and the donee; and the second para lays down under what circumstances a gift may be revoked without any previous agreement.

The first para enumerates the broad general rule that there is no gift at all when a person purports to give and at the same time retains the liberty of revoking the gift at his pleasure. But this rule is subject to an exception, *viz.*, that a power of revocation would be valid if the event on the happening of which the gift can be revoked does not depend upon the will of the donor.

Who can revoke:—The right of a person to avoid a voidable gift under the second para of this section is one personal to himself, and cannot be transferred, because the right to revoke a gift is in the nature of a right to sue, which is not transferable under sec. 6 (e) of this Act—*Bajinath v. Biraj Koer*, 2 Pat. 52 (64), 4 P.L.T. 239, A.I.R. 1922 Pat. 514.

But the right survives to the heirs of the donor—*Ghumna v. Ram Chandra*, 47 All. 619, 88 I.C. 411, A.I.R. 1925 All. 437. A right to have a gift set aside for fraud or undue influence does not cease on the death of the donor, but passes to his legal representatives and executors—*Allcard v. Skinner*, (1887) 36 Ch. D. 145 (*per* Lord Lindley); *Morley v. Loughman*, [1893] 1 Ch. 736.

Revocation by agreement:—The agreement referred to in the first para of this section must be entered into at the time of the gift, for a gift which is complete and absolute at the time it is made cannot be modified by a condition subsequently added—*Ram Sarup v. Bela*, 6 All. 313 (P.C.).

"Event which does not depend on the will of the donor":—A gift cannot be revoked at the mere will of the donor. And if the parties agree that the gift shall be revocable at the will of the donor, it is really no gift at all and is void—*Nawab Ibrahim v. Ummatul*, 19 All. 267 (P.C.). This section recognises the validity of a power of revocation in the case of a gift, provided the event on the happening of which the gift can be

revoked does not depend on the will of the donor. Thus, where the defendants made a gift of certain property to the plaintiff, on condition that the land would be liable to be taken back in the event of the plaintiff's transferring it, it was held that as the event on which the power of revocation was to be exercised did not depend upon the will of the donor, the condition of revocation was therefore valid—*Makund v. Rajrup*, 4 A.L.J. 708. Similarly where a person executed a deed of gift to the donee, and on the same day the donee executed another registered deed by which he agreed not to transfer the property without the consent of the donor, and that if he did so he would return the property to the donor, held that this agreement was valid under the first para of this section, because the donee agreed that the gift would be revocable on the happening of an event (transfer of the property by the donee) which did not depend upon the will of the donor—*Ma Yin v. Ma Chit*, 7 Rang. 306, A.I.R. 1929 Rang. 226 (227), 119 I.C. 737.

On the same principle, a grant of land subject to the rendering of services can be resumed on the grantee refusing to perform the services—*Forbes v. Mir Mahomed*, 5 B.L.R. 529 (P.C.); *Hurrogobind v. Ramrutno*, 4 Cal. 67; but so long as the grantees are willing and able to perform the services, the grantor has no right to put an end to the tenure—*Venkata Narasimha v. Sobhanadri*, 29 Mad. 52 (P.C.).

641A. Revocation before registration:—It was once held by the Bombay High Court that this section, dealing with the revocation of a gift, referred only to a *complete* gift and not to an *inchoate* gift; an inchoate gift could be revoked under all circumstances and its revocation was not restricted by the limitations imposed by this section. Therefore, if a deed of gift was handed over to the donee but not registered, the gift was incomplete, and the donor was entitled to revoke the gift before the donee got the document registered, and to file a suit to restrain the donee from completing the gift by getting it registered—*Subba Rama v. Venkat Subba*, 48 Bom. 435 (440), 26 Bom.L.R. 427, 80 I.C. 477, A.I.R. 1924 Bom. 434. But this decision has been reversed by the Privy Council in *Venkat Subba v. Subba Rama*, 52 Bom. 313 (P.C.), 30 Bom.L.R. 827, 32 C.W.N. 708, 108 I.C. 367, A.I.R. 1928 P.C. 86 (87), where their Lordships have authoritatively laid down that once a deed is executed and delivered to the donee, the gift is complete, and the donor cannot revoke the gift even before registration, on the ground that the gift is not completed until it is registered. Consequently if the donee refuses to give back the document, the donor cannot obtain an injunction from the Court restraining the donee from proceeding to register the document. So also, in the Full Bench case of *Atmaram v. Vaman*, 49 Bom. 388 (F.B.), 27 Bom.L.R. 290, 87 I.C. 490, A.I.R. 1925 Bom. 210, the majority of the Judges laid down that where the donor of immoveable property handed over to the donee an instrument of gift duly executed and attested, and the gift was accepted by the donee, it was not competent to the donor to revoke the gift of the property even before registration and to file a suit to recover possession of the property from the donee. And this view has been confirmed by their Lordships of the Judicial Committee in *Kalyanasundaram v. Karuppa*, 50 Mad. 193 (P.C.), 31 C.W.N. 509, 100 I.C. 105, A.I.R. 1927 P.C. 42.

642. Para 2: Gift when can be revoked:—Para 2 of this section lays down that a gift may generally be rescinded on the same grounds

mutatis mutandis as a contract, and the circumstances under which a contract may be rescinded are laid down in sec. 19 of the Indian Contract Act: "When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so obtained."

The words in brackets "save want or failure of consideration" are used because a gift is itself a transfer without consideration.

Thus, the grounds on which a gift may ordinarily be set aside are coercion, undue influence, fraud, mistake or misrepresentation—*Beharilal v. Sindhubala*, 45 Cal. 434, 22 C.W.N. 210 (212), 41 I.C. 878, and the onus of proving that the gift is revocable on any of the above grounds lies on the party who wants to get the gift set aside. "The law is that anybody of full age and sound mind who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act, and if he himself comes to have the deed set aside, especially if he comes a long time afterwards, he must prove some substantial reason why the deed should be set aside"—*per* Kay J. in *Henry v. Armstrong*, (1881) 18 Ch. D. 668.

But where the donor is an old and infirm woman, the burden lies heavily on the donee to show that the donor executed the deed with full knowledge of its contents, and that she did so willingly and without any pressure or solicitation, which might amount to exercise of undue influence—*Rajaram v. Khandu*, 14 Bom.L.R. 340, 15 I.C. 529. So also, if gifts are made by a *pardanashin* lady, the strongest and most satisfactory evidence ought to be given, by the person who claims under the gift from her, that the transaction was real and *bona fide* and was fully understood by the lady whose property is dealt with—*Thakurdeen v. Ali Hossein*, 13 B.L.R. 427 (P.C.); *Wazid Khan v. Ewaz Ali Khan*, 18 Cal. 545 (P.C.). Similarly, if the person in whose favour the gift is executed stood at the time in a position of active confidence to the donor, *e.g.* an agent, the law throws the burden of proving the good faith of the transaction on the donee—*Phulchand v. Lakkhu*, 25 All. 358. When the donor who was a man of weak health settled the bulk of his property on the defendant who was his family priest and who had a considerable influence over the mind of the donor, the burden of proving that the settlor understood the legal effect of the settlement (*viz.* that it was irrevocable) was on the defendant; and the defendant having failed to do so, the deed must be set aside—*Bai Manigavri v. Narondas*, 15 Bom. 549.

The donor is entitled to revoke a deed of gift on the ground of fraud, undue influence or misrepresentation even *before* the deed is registered. The rule in 52 Bom. 313 (P.C.) (cited in Note 641A above) would not apply to such a case. The donor is entitled, after the execution of the deed of gift and before its registration, to retract from the gift on the ground of undue influence, and in such a case the donee is not entitled to have the document compulsorily registered—*Padmavati v. Shrinivasa*, 7 L.W. 339, 44 I.C. 483.

This para presupposes that the gift is voidable and not void *ab initio*. If it is void *ab initio*, it is not necessary to have it set aside by a suit—*Ghumna v. Ram Chandra*, 47 All. 619, A.I.R. 1925 All. 437 (438); *Baij Nath v. Biraj Kuer*, 2 Pat. 52 (65).

643. What are not grounds of revocation:—The only circumstances under which a gift may be revoked are specified in paras 1 and 2.

The third para lays down that a gift is not revocable otherwise. And so, a gift cannot be revoked at the mere will of the donor. A gift once made cannot be capriciously recalled by the donor, for a transfer by gift is as complete and binding on the parties when once completed as any other form of transfer—*Rajaram v. Ganesh*, 23 Bom. 131. The donor cannot set aside the gift once made on the plea that he had made a mistake or that he had supposed that the donee could perform his funeral rites—*Abhachari v. Ramchandrayya*, 1 M.H.C.R. 393. “Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of the donors. The Courts have already repudiated any such jurisdiction. It would obviously be to encourage folly, recklessness, extravagance and vice, if persons could get back property which they foolishly made away with, whether by giving it to a charitable institution or by bestowing it on less worthy objects.”—*Allcard v. Skinner*, 36 Ch. D. 145 (183). So also, ignorance of the result of deliberate choice is no ground for equitable relief—*Ibid*. So also, the fact that the donor’s feelings towards the donee changed after the deed of gift was executed is not a ground for revoking the deed—*Venkatsubba v. Subba Rama*, 52 Bom. 313 (P.C.), A.I.R. 1928 P.C. 86, 108 I.C. 367. “The law of this Court is very strict on the subject of voluntary deeds The mere alteration of intention is not sufficient to induce this Court to interfere and cancel an instrument which was fully understood and deliberately executed by the grantor. That I believe to be the case here, and being so, I cannot interfere merely because the feelings of the plaintiff towards the defendant are now no longer what they were at the time when the gift was made”—*Toker v. Toker*, (1862) 31 Beav. 629: 9 Jur. (N.S.) 370. So also, where a woman executed a deed of gift by which she conveyed all her property to her nephew, and she executed the deed with full possession of her senses and without the exercise of any fraud, misrepresentation or undue influence on her, and she fully understood its contents and the effect it would have of divesting her of her property, *held* that the deed was binding on her and could not be set aside, and the mere fact that the donor’s feelings towards the donee subsequently underwent a change was not sufficient to set aside the gift—*Rajaram v. Khandu*, 14 Bom.L.R. 340, 15 I.C. 529. A gift of a non-transferable occupancy holding cannot be revoked by the donor on the ground that it is non-transferable. It is binding as between the donor and the donee. It cannot be impeached by the donor himself, though the landlord may possibly refuse to recognise the transfer—*Beharilal v. Sindhubala*, 45 Cal. 434, 22 C.W.N. 210 (213), 41 I.C. 878.

Even if a donor might have made a gift under undue influence, yet if he had subsequently acquiesced in it, he cannot afterwards impeach it—*Seetharamaraju v. Bayanna*, 17 Mad. 275.

644. Hindu and Muhammadan law:—The rules of Hindu law as to revocation of gifts are substantially the same as that contained in the second para of this section. A Hindu may revoke a gift made in wrath or excessive joy or through inadvertence or during disease, minority or madness, or under the influence of terror or under intoxication. Since the rule under this section does not substantially affect the above rule of Hindu law, this section may be justly applied to Hindus.

But the rules of Muhammadan law as regards revocation of gifts are entirely different, and this section therefore ought not to be applied to

them. A Mahomedan can revoke a gift even after delivery of possession except in the following cases:—(1) when the gift is made by a husband to his wife or by a wife to her husband; (2) when the donee is related to the donor within the prohibited degrees; (3) when the gift is *Sadaka* (i.e., made to a charity or for any religious purpose); (4) when the donee is dead; (5) when the thing given has passed out of the donee's possession by sale, gift or otherwise; (6) when the thing given is lost or destroyed; (7) when the thing given has increased in value, whatever be the cause of the increase; (8) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding; (9) when the donor has received something in exchange for the gift—*Hedaya*, 485; Baillie, 524-548; Mulla's *Mahomedan Law*, 7th Ed. pp. 121—122. Except in those cases, a gift may be revoked at the mere will of the donor, whether he has or has not reserved to himself the power to revoke it, but the revocation must be by decree of Court.

127. Where a gift is in the form of a single transfer to the same person of several things, of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them, and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract, and accepting property burdened by any obligation, is not bound by his acceptance. But, if after becoming competent to contract, and being aware of the obligation, he retains the property given, he becomes so bound.

Onerous gift to disqualified person.

Illustrations.

(a) A has shares in X, a prosperous joint-stock company and also shares in Y, a joint-stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint-stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b) A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not, by his refusal, forfeit the money.

645. Principle:—The principle of the first para of this section is that he who accepts the benefit of a transaction must also accept the burden of the same: *Qui sentit commodum sentire debet et onus*. And so it was observed in an English case (which related to a will) that “no man shall claim any benefit under a will without conforming so far as he is able and giving effect to every thing contained in it whereby any dis-

position is made shewing an intention that such a thing shall take place"—*Whistler v. Webster*, 2 Ves. 367. This section lays down a rule of election that where a gift consists of several things some of which are burdened with an obligation, he is put to his election either to accept the whole gift or not to accept anything at all. He cannot pick up the benefits of the transaction and reject the burdens. This rule applies only where the donor has by one *inseparable* transaction made the gift and burdened it with an obligation. But where a gift is in the form of two or more separate and independent transfers, some of which are so burdened, no question of election arises, and the donee is at liberty to accept any or all of them.

This section, being an embodiment of a rule of equity, applies equally to Hindus and Mahomedans—*Abdul Sattar v. Satyabhushan*, 35 Cal. 767.

For acceptance of an onerous gift, acceptance of the gift itself is sufficient; there need not be any separate and express acceptance of the onerous condition also at the same time. The acceptance of the gift will carry with it the acceptance of the onerous condition also, even though at the time of the gift the donee was not aware of such condition, specially where the onerous condition is of a trifling nature (payment of Rs. 5 as monthly maintenance to a certain person for life)—*Sarba Mohan v. Manmohan*, 37 C.W.N. 149 (152), 143 I.C. 757, A.I.R. 1933 Cal. 438.

Disqualified donee:—If an onerous gift is made to a disqualified person, *e.g.*, a minor, and that person accepts it, he is not bound by his acceptance but can make his choice upon attaining majority either to accept the gift burdened with the obligation or to return it. But so far as the *donor* is concerned the gift is complete as against him, and he cannot claim back the property unless the donee returns it after attaining majority (if he so chooses). And if therefore the donee dies in his infancy, the donor cannot resile from his gift and resume the property treating the gift as inchoate or revocable. The property will in such a case pass to the heirs of the donee—*Subramania v. Lakshmi*, 20 Mad. 147.

128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by *and liabilities* of the donor at the time of the gift to the extent of the property comprised therein.

Amendment:—The words "and liabilities of" have been added by sec. 60 of the T. P. Amendment Act (XX of 1929).

"The scope of this section is made clear by the addition of the word "liabilities" after the word "debts." A donee should be liable to the extent of the property in his hands not only for the debts of the donor, but also for his other liabilities (Hunter's Introduction to Roman Law, p. 150)."—*Report of the Special Committee*.

646. Universal donee:—The essential condition to constitute a universal donee is that the gift must consist of the donor's *whole* property. If any portion of the donor's property, no matter whether it is moveable or immoveable, is excluded from the operation of the gift or the endowment, the donee is not a universal donee. The creditor is entitled to the benefit of this section against a person who is a universal

donee and nothing short of a universal donee—*Shyam Behari v. Maha Prasad*, 1930 A.L.J. 99, A.I.R. 1930 All. 180 (182), 123 I.C. 324. Therefore, if a person makes a gift of all his immoveable properties, but not of all the *moveable* properties, the donee cannot be called a universal donee—*Anrudh v. Lachhmi*, 50 All. 818, 26 A.L.J. 753, A.I.R. 1928 All. 500 (502), 115 I.C. 114. Where a Mahomedan made a gift of the whole of his estate to his son and directed him to pay his debts, the son was a universal donee and he was liable to pay all the debts of the donor. There is no rule of Mahomedan law which conflicts with the provisions of this section—*Abid Husain v. Ram Nidh*, 7 O.W.N. 532, A.I.R. 1930 Oudh. 268.

If a donor has two properties P and K, of which P is mortgaged to another, and the donor makes a gift of property K only, the donee is not a universal donee. So long as the property P has not been foreclosed by the mortgagee, the donor is still the owner of it; consequently if it is not included in the gift, it cannot be said that the gift consists of the donor's *whole* property—*Brij Raj v. Ram Dayal*, 7 Luck. 411, 135 I.C. 369, A.I.R. 1932 Oudh 40 (43).

The rule enacted in this section is independent of sec. 53. Therefore a creditor is not bound to get the gift set aside under that section in order to get himself paid, but can proceed against the donee under this section. Further, sec. 53 speaks of *fraudulent* transfers of *immoveable* property, whereas the present section applies to both moveables and immoveables and the gift under this section is not necessarily fraudulent. If the gift is fraudulent and the property immoveable, sec. 53 applies; if it is honest, remedy may be had under this section. And so the Law Commissioners observe:—"Gifts of one's whole property to a relation or friend are not uncommon before an execution or in anticipation of insolvency. For such cases of fraud, sec. 53 *supra* provides, when the property is land. But an universal gift may conceivably be honest and comprise moveable property. Sec. 128 therefore specially provides for such gifts."

The rule in this section is different from that in England. Under the English law, a universal donee is not bound to discharge the donor's debt except on the latter's death or insolvency or when the transfer has been made with intent to defraud creditors.

Where the donor had contracted secured as well as unsecured debts from the same person, the creditor can tack the unsecured debts to the secured ones, and claim that the universal donee will not be allowed to redeem the mortgage alone without paying off the unsecured debts as well, although the original mortgagor (the donor) could have redeemed the mortgage without paying off the unsecured debts—*Ragho Govind v. Balvant*, 7 Bom. 101.

129. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan Law. * * * * *

Saving of donations mortis causa and Muhammadan Law.

Amendment:—The words "or save as provided by section 123, any rule of Hindu or Buddhist Law" have been omitted by sec. 61 of the T. P. Amendment Act (XX of 1929) for the following reasons:—

"Apart from the provisions of sec. 123, section 129 saves all rules of Hindu and Buddhist law relating to gifts. The provisions of Chapter VII relating to gifts are based on general principles and do not conflict with the rules of Hindu or Buddhist law. The Government of Burma does not object to the omission of the word 'Buddhist' from the section. We propose to omit the reference to Hindu and Buddhist law."—*Report of the Special Committee.*

Scope:—This section exempts donations *mortis causa* of moveable property from the operation of this chapter; the reason is, that such gifts are in the nature of wills, and have been provided for by sec. 191 of the Indian Succession Act, 1925. It should be noted that gifts of only *moveable* property made in contemplation of death are excepted here; a similar gift of immoveable property must be made according to the rule under this chapter. Further, it provides that the provisions of this chapter shall not affect the rules of Muhammadan law.

647. Donatio mortis causa:—"A gift is said to be made in contemplation of death when a man who is ill and expects to die shortly of illness delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness. Such a gift may be resumed by the giver and shall not take effect if he recovers from the illness during which it was made, nor if he survives the person to whom it was made."—Sec. 191, Indian Succession Act, 1925.

The distinction between a gift and a *donatio mortis causa* is that the former takes effect immediately, while the latter takes effect only on the death of the donor; the latter is revocable at the will of the donor, but the former is not.

A gift made in contemplation of suicide is not a valid *donatio mortis causa*, as that would be against public policy—*Agnew v. Belfast Banking Co.*, (1896), 2 Ir. R. 204.

Where the deceased, a few hours before his death, and in contemplation of death, caused certain Government papers to be fetched and himself gave them into the hands of the plaintiff with the intention of passing the property to him, but could not make the endorsement because he was too weak to do so, *held* that under the circumstances the gift amounted to a valid *donatio mortis causa*—*Kumar Upendra Krishna v. Nabin Krishna*, 3 B.L.R. O.C. 113.

648. "Shall not affect":—This section does not mean that the provisions of this Chapter shall not at all apply to Mahomedans, but it only lays down that its provisions shall not *affect* any rule of Mahomedan Law. In other words, whenever the provisions of this Chapter shall conflict with those of Muhammadan law, the latter shall prevail. Thus, under the Mahomedan law, a gift of immoveable property may be made orally by simple delivery of possession, but this Chapter lays down that such a gift must be made by a registered instrument. Here there is a conflict, and the Muhammadan law must therefore prevail. So again, the rules of Mahomedan law as to revocation of gifts are entirely different from the rule enacted in sec. 126, and therefore the Mahomedan law shall prevail. See Note 632 under sec. 123 and Note 644 under sec. 126.

But in so far as the rules of this Chapter are founded upon equity and reason, they do not conflict with any rule of Mahomedan law.

Thus, sec. 127 being an embodiment of a principle of equity has been held to be equally applicable to Hindus and Mahomedans; see *Abdul Sattar v. Satyabhusan*, 35 Cal. 767; also 7 O.W.N. 532 in Note 646 under sec. 127.

The Local Government in the exercise of the powers conferred on them by sec. 1 of this Act has extended sec. 123 of this Act to Burma. This must mean that the Local Government has extended sec. 129 also, because the power conferred by sec. 1 to extend "the whole or *any part* of this Act" does not authorise the Local Government to extend any particular section of the Act so as to give that section a different operation from that which it has in the Act itself read as a whole, and thus to abrogate in the area to which the extension is made the existing rule of Mahomedan law as to delivery of possession regarding gifts as to which the Legislature has expressly provided that it should remain unaffected by this Act. So in Burma, the rule of Mahomedan law, *viz.*, that a gift is perfected by delivery of possession, applies and no registration is necessary; see *Ma Mi v. Kallander Ammal*, 5 Rang. 7 (P.C.), 31 C.W.N. 625, 100 I.C. 32, A.I.R. 1927 P.C. 22.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

130. (1) The transfer of an actionable claim *whether with or without consideration* shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, and * * * shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person, from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without

obtaining the transferor's consent to such suit or proceedings, and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance.

Illustrations.

(i) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.

(ii) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy, and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132.

Amendment:—by section 62 of T. P. Amendment Act (XX of 1929), the words "*whether with or without consideration*" have been added and the words "notwithstanding anything contained in sec. 123" have been omitted. The Special Committee gives the following reasons for the amendment:—

"The words 'notwithstanding anything contained in section 123' were inserted in the section by the Transfer of Property (Amendment) Act, XXXVIII of 1925. The object was to give effect to representations made by insurance companies that it involved considerable hardship when a gift was to be made of a life policy, as under section 123 such a gift could only be made by a registered instrument. Doubts, however, have arisen whether these words applied to a gift of an actionable claim by a Muhammadan. In a recent Bombay case it was contended that the words applied only to those cases where prior to the amending Act, a gift of moveables was required to be effected by a registered instrument under section 123; and, as section 123 did not apply to a Muhammadan gift, those words did not apply to Muhammadan gifts. This view was given effect to by the High Court of Bombay. We do not think it desirable that a gift of an actionable claim by Muhammadans should be exempted from the operation of the present rule which requires a writing in the case of a gift of an actionable claim. In fact, in a large majority of cases a gift of an actionable claim is in fact made by a writing, as in the case of gifts of life policies. To remove the doubt caused by the words 'notwithstanding anything contained in section 123' we propose to omit them and insert the words '*whether with or without consideration*' after the words 'The transfer of an actionable claim.'"—*Report of the Special Committee.*

The result is that a gift of an actionable claim even by a Muhammadan must be made in writing.

648A. Actionable claim:—The definition of actionable claim is contained in sec. 3. This definition has been substituted by the Transfer of Property Amendment Act (II of 1900) for the old definition which ran thus:—"A claim which the Civil Courts recognise as affording grounds for relief is actionable, whether a suit for its enforcement is or is not actually pending or likely to become necessary." But this definition was

too wide and covered every claim for which an action would lie in Courts, so as to include claims arising out of sales, gifts, mortgages or leases of immoveable property or exchanges or gifts of moveable property within its provisions. It was subjected to different interpretations by different High Courts, and they were at hopeless variance with one another as to whether a mortgage-debt was included in the term "actionable claim." This conflict has now been set at rest by the Amendment Act of 1900, and the definition has been narrowed down to that given in section 3, from which a mortgage-debt has been expressly excluded.

As to what are and what are not actionable claims, see Note 21 under sec. 3.

649. Scope of section:—This section implies that every actionable claim is transferable and the section points out how it may be transferred—*Abu Mahomed v. S. C. Chunder*, 36 Cal. 345 (351).

The word 'transfer' means not only an absolute transfer, but also covers transfer of actionable claims by way of mortgage—*Mulraj v. Viswanath*, 37 Bom. 198 (P.C.), 17 C.W.N. 209, 17 I.C. 627; *Muthu Krishna v. Veeraraghava*, 38 Mad. 297, 21 I.C. 316; *Venkatachalam v. Subramanya*, 14 I.C. 144, 1912 M.W.N. 461. Sec. 134 provides for the transfer of a debt by way of mortgage.

In a Madras case it was held, following the English law, that the transfer of a debt must be of the *whole* debt, and that a transfer of a *portion* of a debt is not recognised—*Doraisami v. Doraisami*, 48 M.L.J. 432, A.I.R. 1925 Mad. 753 (756), following *Durham v. Robertson*, (1898) 1 Q.B. 765. But in a recent case of the same High Court it has been ruled that although a transfer of a part of a debt was not recognised in English Common Law, the assignment of a part of a debt has always been held to be good in Equity, and is deemed to pass the property in that portion of the debt. In enforcing such claim it would be necessary to implead the owner of the other portion of the debt, but apart from that there is no objection in equity to the enforcement of a claim for part payment of a debt—*Rajamier v. Subramaniam*, A.I.R. 1928 Mad. 1201 (1207), following *In re Steel Wing Co.*, [1921] 1 Ch. 349, and virtually dissenting from *Doraisami v. Doraisami*, *supra*.

A transfer of an actionable claim is to be distinguished from a *novation of a contract*, which does not require any writing. Thus, where there is a debt due by A to B, and another debt due by C to A, and the three parties meet and agree that instead of A paying B, and C paying A, C shall pay B. The result of such an arrangement is to destroy the old debts which A owed to B, and which C owed to A, and to substitute a new debt by C to B. This is something different from a mere transfer of the debt—*Jivraj v. Lalchand*, 56 Bom. 462, 34 Bom.L.R. 837, 139 I.C. 582, A.I.R. 1932 Bom. 446 (447).

A *dedication* is not a *transfer*; consequently a dedication of an actionable claim to a temple is not a transfer of an actionable claim, and is not governed by section 130, but may be made *orally*—*Bhopatrao v. Sri Ramchandra*, A.I.R. 1926 Nag. 469, 96 I.C. 1004.

As this Act is not in force in the Punjab, the technical rule requiring an assignment of an actionable claim to be made in writing is not applicable to that province. Consequently, an oral assignment of a promissory note is valid—*Locha Ram v. Hem Raj*, 33 P.L.R. 120, 134 I.C. 121,

650. Transfers how effected:—A transfer of an actionable claim can be effected simply by the execution of an instrument in writing. Nothing more is necessary. The provisions of secs. 54, 59 and 123 regarding sales, mortgages and gifts do not apply to a sale, mortgage or gift of an actionable claim. A gift of an actionable claim may therefore be made without a *registered* instrument as required by sec. 123—*Syed Yacoob v. Pancha Bibi*, 4 L.W. 339, 38 I.C. 248. This is now made clear by the recent amendment made in 1929 by which the words “whether with or without consideration” have been newly added in this section. See Notes under heading “Amendment” above. The view expressed by Duckworth, J., in *K. V. v. Chettiar*, 5 Bur.L.J. 179, A.I.R. 1927 Rang. 39, that a transfer of an actionable claim can be made only by a *registered* instrument, is erroneous.

The transfer can only be made in writing—*Velayutham v. Pillaiyar*, 9 M.L.T. 102, 9 I.C. 287; an oral transfer is not valid—*Raman Chetty v. Nagaratna*, 11 M.L.T. 246, 15 I.C. 880. Even a gift of an actionable claim by a Mahomedan must be in writing. See “Amendment” *ante*. The mere *delivery* of a promissory note without any endorsement or written transfer is not sufficient to effect a transfer—*Akhoy Kumar v. Hari Das*, 18 C.W.N. 494, 22 I.C. 510. So again, the mere deposit of a policy of life insurance does not effect a transfer (mortgage) of the policy in favour of the depositor—*Mulraj v. Viswanath*, 37 Bom. 198 (P.C.), 17 I.C. 627; *Official Assignee v. Thompson*, 8 Bur.L.T. 157, 30 I.C. 602. When A had effected a policy of insurance upon his own life and it was expressed to be for the benefit of his wife, *held* that in the absence of an assignment in writing, the beneficial interest under the policy would not pass to A's widow upon his death—*Shankar v. Umabai*, 37 Bom. 471, 19 I.C. 736. In this case, sec. 6 of the Married Women's Property Act (III of 1874) could not be applied, because that section was held to be inapplicable to a policy of insurance effected by a Hindu for the benefit of his wife and children. But this ruling (37 Bom. 471) is no longer good law in view of the enactment of the Married Women's Property Amendment Act (XIII of 1923), which makes the provisions of sec. 6 of the Married Women's Property Act 1874 applicable to policies effected by Hindus, Muhammadans, etc., after the 1st April 1923.

No particular words are necessary to effect a transfer of an actionable claim, if the intention to transfer is clear from the language used. An *endorsement* on the bond containing a direction to pay the amount due on the bond to the plaintiff, coupled with the delivery of the instrument so endorsed to the plaintiff, amounts to a valid transfer of the instrument so as to enable the plaintiff to sue upon it—*Rama Iyer v. Venkatachellam*, 30 Mad. 75; *Kissen Gopal v. Bavin*, 42 C.L.J. 43, 89 I.C. 735, A.I.R. 1926 Cal. 447. A non-negotiable promissory note may be assigned by a *separate deed* without any endorsement on the note itself and the assignee will be entitled to sue upon it—*Sugappa v. Govindappa*, 12 M.L.J. 351. It would also be sufficient if the transfer is evidenced by a partition list; for the partition list is a writing and therefore satisfies the requirements of this section—*Venkatadri v. Lakshminarasimha*, 21 M.L.J. 80, 8 I.C. 83. An assignment made in a statement of accounts by way of an entry in an account book is an assignment in writing within the meaning of this section—*Seetharama v. Narayanaswami*, 47 I.C. 749. If a bond is delivered by the creditor to the transferee without any endorsement on it, and the

creditor also gives a letter to the transferee in which he requests the debtor to pay the money to the transferee, the letter constitutes a valid assignment under this section—*Konjeti Veerasawmy v. Varada Veerasawmy*, 13 M.L.T. 77, 16 I.C. 708. Where certain bales of cotton held as security by one creditor were transferred in favour of another to be held by him as security, and the next day the debtor wrote to the latter a letter which after stating the total amount of indebtedness continued: "As against the said amount our bales which are lying with by (previous creditor) are got transferred to your name," *held* that the writing amounted to a valid transfer—*Jivraj v. Lalchand*, 56 Bom. 462, 139 I.C. 582, A.I.R. 1932 Bom. 446 (448). A deposit receipt of a Bank may be validly assigned by an endorsement on the receipt together with a letter given to the transferee in which the transferor directs the Bank to pay the money to the bearer—*Sethna v. Hemingway*, 38 Bom. 618, 16 Bom. L.R. 534, 28 I.C. 144.

The instrument in writing by which the actionable claim is transferred must be an instrument of *transfer*. A deed of *relinquishment* is not an instrument of transfer, and therefore where a partner of a partnership business executed a deed of release by which he gave up his claim to the business and declared that henceforth the business should be conducted by H and D, *held* that there was no transfer in favour of H and D, and no title passed to them—*Dharam Chand v. Mouji*, 16 C.L.J. 436, 16 I.C. 440.

There must be words of transfer in the instrument of transfer. A mere *notice* to the debtor asking him to pay the debt to the assignee, does not amount to a transfer of the debt; thus, where the assignment of a debt consisted of a letter from the assignor to the assignee and another letter by the assignor to the debtor intended to be a notice under sec. 130 T. P. Act, and the letter of assignment (which was not proved to be stamped) was lost, *held* that the second letter, which was merely a notice to the debtor not containing any words of transfer nor referring to the transfer, was not sufficient to operate as an instrument of transfer. An instrument of transfer should, except in special cases, be in favour of the assignee, whereas a notice is addressed to the *debtor*—*Doraisami v. Doraisami*, 48 M.L.J. 432, 87 I.C. 382, A.I.R. 1925 Mad. 753 (754). So also, a mere direction for payment of money to a certain person does not amount to an assignment of the money to that person. Thus, a company sold and delivered to Kilburn and Co., a lathe for a certain sum. One G claimed to be entitled to the sum by virtue of an assignment alleged to have been made by the company. The assignment on the back of the bill against Kilburn & Co., was in these terms: "Messrs. Kilburn & Co., kindly remit to G who will collect on our behalf." *Held* that the above words did not amount to an assignment of the debt due to the company, but to a mere order for payment of the money due from Kilburn & Co.—*Kissen Gopal v. Bavin*, 89 I.C. 735, 42 C.L.J. 43, A.I.R. 1926 Cal. 447 (449).

This section does not apply to assignments of negotiable instruments (sec. 137); such instruments can be assigned according to the provisions of the Negotiable Instruments Act—*Venkatadri v. Lakshminarasimha*, 21 M.L.J. 80, 8 I.C. 33. But an assignment of a non-negotiable instrument must be made according to the rules under this section. Thus, a deposit receipt is not a negotiable instrument which can pass either by delivery or by endorsement under the Negotiable Instruments Act. It must be assigned

according to the provisions of this section—*Sethna v. Hemingway*, 38 Bom. 618, 28 I.C. 114.

651. Notice:—The validity of the transfer does not depend upon the giving of notice to the debtor, although it may be necessary for the transferee to give notice to prevent the debtor from dealing with the debt to the prejudice of the transferee—*Viswanath v. Mulraj*, 13 Bom. L.R. 590, 11 I.C. 964; *Kalka Prashad v. Chandan*, 10 All. 20. Notice of transfer is not essential to perfect the title of the assignee of an actionable claim, but until the debtor receives notice of the assignment, his dealings with the original creditor will be protected. In other words, if the debtor pays the debt to the original creditor without having any notice of the transfer, he will not be bound to pay it over again to the assignee—*Gopala Krishna v. Gopala Krishna*, 33 Mad. 123; *Basant Singh v. Burma Railways Co.*, 8 L.B.R. 288. But any payment by the debtor to the original creditor, *after* notice of the transfer, is made at the risk of the debtor and will not absolve him from liability to the transferee—*Gopala Krishna v. Gopala Krishna*, 33 Mad. 123. This subject has been thus elaborately explained in a Calcutta case:—"It is well settled according to English law that it is not necessary to the validity of an assignment of a debt as between the assignor and assignee that notice should be given to the debtor. The assignment, therefore, is perfectly valid though no notice is given. But the title of the assignee as against third persons is not complete until he has given notice, and the reason is this: As between the debtor and assignor the liability on the part of the debtor is still subsisting, and the debtor may pay the assignor, or the assignor may afterwards assign to a third party who gives notice and thereby acquires priority. Notice, therefore, ought to be given by the assignee to protect himself, and for this purpose only. It is immaterial to the debtor whether he pays his money to the original creditor or to some third person claiming through such creditor, so long as he gets a discharge for his debt. If he pays the assignor, having no notice of the assignment, he is protected. The assignment does not in any way affect the liability of the debtor to discharge his debt, but the assignee should take care to let the debtor know that it is he and not the original creditor who is entitled to be paid. It is therefore only for the protection of the assignee that notice ought to be given"—*per* Mitter and Agnew J.J. in *Lala Jagdeo v. Brij Behari*, 12 Cal. 505 (509, 510).

Where there are two transferees, the transferee who first gives notice to the debtor does not acquire any priority over the other transferee, but the transferees take in the order of the date of transfer—*Vishwanath v. Mulraj*, 13 Bom.L.R. 590, 11 I.C. 964.

As to the essentials of notice see the next section.

Effect of transfer:—A transfer of an actionable claim takes effect immediately from the date of the transfer, and not from the date of notice which the transferor or transferee may or may not give to the debtor.

From the date of assignment, all the rights of the transferor in the actionable claim vest in the transferee. If a debt is transferred by way of sale, but the transferor in spite of the sale realises the amount of such debt, it is just and equitable that the vendee should be allowed credit for the amount so realised, out of the consideration—*Ramdas v. Dwarka*, A.I.R. 1930 All. 875 (876), 128 I.C. 763.

Consent of debtor, not necessary:—The consent of the debtor is not

necessary for the assignment of an actionable claim. The assignment, therefore, does not become invalid for want of such consent—*Seetharama v. Narayanaswami*, 47 I.C. 749.

652. Sub-section (2)—Who can sue after transfer:—The transferee is the only person who can sue for the debt after transfer—*Arunachalam v. Madaswami*, 27 M.L.T. 269; *Muthukrishna v. Veeraraghava*, 38 Mad. 297, 21 I.C. 316. He can sue in his own name and it is not necessary for him to obtain the transferor's consent, or to make him a party to the suit. In a recent Madras case, it has been held that although sec. 130 lays down that when an actionable claim is transferred, all the rights and remedies of the transferor are transferred to the transferee, still the *transferor* may maintain an action on the claim for the benefit of the transferee, and hand over the amount when collected to the transferee—*Chandrasekaralingam v. Nagabhushanam*, 53 M.L.J. 342, A.I.R. 1927 Mad. 817, 104 I.C. 409.

As notice is not a condition precedent to the validity of a transfer of a debt, it is competent to the transferee to bring a suit against the debtor without giving a previous notice of the assignment. The suit is not liable to be dismissed on the ground that no notice of the assignment was given to the debtor. Even if notice to the debtor is necessary, the institution of the suit is in itself a notice of the assignment—*Kalka v. Chandan*, 10 All. 20 (27); *Lala Jagdeo v. Brij Behari*, 12 Cal. 505 (510); *Subbammal v. Venkatarama*, 10 Mad. 289 (290). These cases were decided, before the Amendment of 1900, under the old section 131, which required that the debtor must have notice or must be otherwise aware of the transfer, before he could be made liable to the transferee. Under the present section, notice to the debtor is not at all necessary.

131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Notice to be in writing signed.

654. Essentials of notice:—The notice to be given to the debtor must be an *express* notice, and not merely constructive; see para. 2 of sec. 130.

The old section (132) (before the amendment of 1900) contained the words "Every such notice must be in writing signed by the person making the transfer or by his agent duly authorised in this behalf." That is, it contained no provision as to giving of notice by the *transferee*. And so it was held that as this section did not provide for the assignee giving notice in a particular way, all that was required of him was to make the debtor somehow aware of the transfer. And therefore the service of the summons on the debtor in a suit by the assignee against him was held to be sufficient notice—*Ragho v. Narayan*, 21 Bom. 60 (63). In this case, Farran C. J. expressed the opinion that the duty of giving notice should be cast upon the *transferee*. "Before the passing of the Transfer of Property Act, it was the assignee upon whom it was incumbent for his own protection to give notice of the assignment to the debtor. There is no particular reason why the assignor should give it.

We cannot help thinking that there has been a slip made in sec. 132 (now 131) in throwing upon the person making the transfer the obligation of giving express notice to the debtor.....The attention of the Legislature may well be directed to the point"—*Ragho v. Narayan*, 21 Bom. 60 (62). Out of deference to these remarks the Legislature added the words "or in case.....transferee", thus making a provision for the giving of the notice by the transferee. But still the Legislature has cast the duty of giving notice *primarily upon the transferor*, and it is only when he refuses to give the notice, that the transferee may give it. The notice which the transferor gives must be a valid and sufficient notice; if the transferee finds it insufficient, he is entitled to give a notice of his own—*Gopala Krishna v. Gopala Krishna*, 33 Mad. 123.

The notice must contain the name and address of the transferee. The reason is thus stated by the Select Committee: "A notice in general terms not stating the name and address of the transferee would not be sufficient as a safeguard against fraud. A debtor is, we think, entitled to know the name and address of the person to whom he becomes liable on a transfer of the claim against him." 'Though there be a valid transfer of a debt between the transferor and the transferee, the person bound to pay the debt is not bound by the transfer unless he receives an express notice in writing conforming to the provisions of sec. 131, from the transferor, or if he refuses to sign, from the transferee, stating the name and address of the transferee—*Basanta Singh v. Burma Ry. Co. Ltd.*, 8 Bur.L.T. 266, 30 I.C. 278. Where the notice given by the transferor did not contain the address of the transferee, it was held to be insufficient—*Hansraj v. Nathoo*, 9 Bom.L.R. 838. So also, a notice which did not state the address of the assignee but his solicitor's address, was held to be defective—*Sadasook v. Hoare Miller & Co.*, 27 C.W.N. 733, A.I.R. 1923 Cal. 719 (720), 41 C.L.J. 176.

The notice must be given to the person concerned or to his agent authorised to receive such notice—*Basant Singh v. Burma Ry. Co. Ltd.*, (*supra*).

132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Liability of transferee of actionable claim.

Illustrations.

(i) A transfers to C a debt due to him by B, A being then indebted to B. C sues B for the debt due by B to A. In such suit B is entitled to set off the debt due by A to him, although C was unaware of it at the date of such transfer.

(ii) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.

655. Liabilities of the assignee:—The assignee is bound by all the terms and conditions to which the debt assigned may have been subject. He will therefore be bound by an order of the Court previously passed

relating to the subject-matter of the assignment—*Subbaraya v. Srinivasa*, 10 M.L.J. 211.

The debtor has a right to set off any counter-claim against the assignee which he could have done against the assignor—*Kaim Ali v. Luckhy Kant*, 10 W.R. 32 (F.B.); *Ram Bhaj v. Ram Das*, 3 Lah. 414, 69 I.C. 720, A.I.R. 1923 Lah. 261; *Kristo Ramani v. Kedar Nath*, 16 Cal. 619; and this the debtor can do even when the amount claimed to be set off is due under a transaction independent of and unconnected with the claim assigned to the plaintiff—*Arunachellam v. Subramania*, 30 Mad. 235; *Subramanian v. Kiradadasan*, 1912 M.W.N. 1235, 16 I.C. 686. Such a set-off is enforceable even though the plaintiff was the purchaser of the actionable claim in *Court auction*: though the Act does not apply of itself to a transferee who purchases in a court-sale, still the principle of this section will apply to such transfers—*Subramanian v. Kiradadasan*, 1912 M.W.N. 1235, 16 I.C. 686. See also *Ram Bhaj v. Ram Das*, 3 Lah. 414, where the plaintiff purchased the debt in *Court auction*.

The debtor is entitled to set off against the transferee not only a counter-claim which existed at the time of the assignment, but also a claim which accrued to him *after* the assignment, provided the assignee had notice of such claim. Thus, A obtains a decree against B for Rs. 5,000. B then sues A for Rs. 2,000. Pending B's suit A transfers his decree to C *who has notice* of B's suit. A decree is then passed in B's suit. C applies for execution against B of the decree for Rs. 5,000. B will be entitled to set off his decree for Rs. 2,000 which he has obtained against the assignor A, as C is a transferee with notice of B's suit. C will therefore be not entitled to execute for more than Rs. 3,000—*Kristo Ramani v. Kedar Nath*, 16 Cal. 619. This principle however has not been applied to an assignment of a mortgage, as a mortgage is not an actionable claim. Therefore in a suit by the assignee of a mortgage, the debtor (mortgagor) will not be allowed to set off any claim obtained by him against the assignor (original mortgagee) subsequent to the date of assignment—*Subramania v. Subramania*, 40 Mad. 683, 34 I.C. 859.

A pledge of a promissory note vests in the pledgee all the rights and the remedies of the pledgor subject to all equities which remained in the pledgor. The pledgee is the only person entitled to sue for the debt due under the pro-note, and if he omits to sue and allows the debt to become time-barred, he is accountable to the pledgor for the amount of the debt—*Muthu Krishna v. Veeraraghava*, 38 Mad. 297, 21 I.C. 316 following *Shyam Kumari v. Rameswar*, 32 Cal. 27 (P.C.), and *Mulraj v. Viswanath*, 37 Bom. 198 (P.C.).

Since the assignee of an actionable claim takes it subject to all existing equities, the *onus* of proving affirmatively that the assignment is free from an existing right is upon the assignee—*Venkata Subbiah v. Subba Naidu*, 1915 M.W.N. 822, 31 I.C. 152.

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer,

Warranty of solvency of debtor.

and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

656. This section does not make it compulsory on the part of the assignor to give the assignee any warranty as to the solvency of the debtor, nor does it mean that in every assignment of an actionable claim there shall be implied a covenant by the assignor to warrant the solvency of the debtor. This section merely lays down a rule of construction to be applied only when the assignor actually gives such warranty to the assignee. If the assignor gives the warranty, it means that the debtor is solvent *at the date* of the transfer. The insolvency of the debtor *after* the date of the transfer does not entail any liability on the transferor. But the assignor should do nothing in derogation of his deed, which may prevent effect being given to his assignment—*Aulton v. Atkins*, 25 L.J. (P.C.) 229.

Further, the liability of the transferor as regards the solvency of the debtor is only limited to the extent of the amount of the consideration received by him and not to the extent of the amount of the debt.

134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor, or recovered by the transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Mortgaged debt.

657. Scope:—A transfer of an actionable claim (e.g. debt) can be made not only by way of absolute sale, but also by way of mortgage—*Muthu Krishna v. Veeraraghava*, 38 Mad. 297, 21 I.C. 316.

Though this section speaks only of a mortgage, it is obvious that a *charge-holder* has the same right as a mortgagee. And consequently the holder of a charge on a debt due to his debtor, by way of security for his own loan is to be treated as a transferee of an actionable claim, and so entitled to recover the debt from the transferor's debtor—*Muthu v. Venkatachellum*, 20 Mad. 35; *Ramasami v. Muthu*, 34 Mad. 53, 5 I.C. 834; *Ardesir v. Syed Sirdar*, 33 Bom. 610. See also *Imperial Bank of India v. Bengal National Bank*, 59 Cal. 377 (P.C.), 35 C.W.N. 1034 (1040), A.I.R. 1931 P.C. 245.

135. Every assignee, by endorsement or other writing, of a policy of marine insurance, or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

Assignment of rights under marine or fire policy of insurance.

This section reproduces the only unrepealed section of the Policies of Insurance (Marine and Fire) Assignment Act, 1866 (V of 1866). Inasmuch as the provisions of that enactment constitute an exception to the rule laid down in sec. 130, they ought to find a place in this chapter.

The original section provided for the transfer of marine and fire policies "by endorsement or otherwise," for which the words "by endorsement or other writing," have been substituted by the Amendment Act of 1900.

136. No Judge, legal practitioner, or officer connected with any Court of Justice shall buy, or traffic in, or stipulate for, or agree to receive any share of or interest in, any actionable claim, and no Court of justice shall enforce, at his instance or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid.

Incapacity of officers connected with Courts of Justice.

658. Principle:—The object of this section is to prevent the legal practitioners from purchasing claims with the express purpose of putting them in suit, and thus oppressing debtors and fomenting litigation. Further, the intention of the Legislature was that the persons mentioned in this section should not be placed in a position in which they may be tempted to use the influence or the information which they may acquire by virtue of their possible connection with the transaction of business in the Court, to the prejudice of persons who might have to resort to it for the adjudication of actionable claims—*Rathnasami v. Subramanya*, 11 Mad. 56 (at p. 61). "It is of great importance that no officer of a Court of Justice should be even exposed to the suspicion that in the discharge of his official duties his conduct may be influenced by any personal consideration; and although we see no reason to think that the proceedings in the present case have been at all affected, either in their origin or in their conduct hitherto, by such considerations, yet when there is room for the operation of sinister motives, the belief of their operation can hardly be excluded from the minds of the parties"—*Kerakoose v. Serle*, 3 M.I.A. 329 (at p. 346).

A pleader is guilty of unprofessional conduct if he purchases an actionable claim, especially so if the purchase be speculative, as when a suit has been instituted on the claim, and the claim is ripe for judgment and the seller is his own client unable to judge the result of the suit—*Muni Reddi v. Venkata Row*, 37 Mad. 238, 17 I.C. 544.

659. Scope of Section:—The law under the old section (before the amendment by the T. P. Amendment Act of 1900) stood thus: "No Judge, pleader, mukhtar, clerk, bailiff, or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions." Thus, it appears that under the original section the prohibition was not so extensive as it now is; under that section, the persons specified therein were forbidden to purchase only such claims as fell under the jurisdiction of the Court in which they exercised their functions.. Therefore, a pleader or an officer who did not habitually practice or exercise his functions in the Court by which the actionable claim was cognizable was not prevented from purchasing it—*Appasami v. Scott*, 9 Mad. 5; *Rathnasami v. Subramanya*, 11 Mad. 56 (61); *Singaracharlu v. Sivabai*, 11 Mad. 498; *Subbarayudu v. Kotayya*, 15 Mad. 389. But having regard to the fact that there are constant changes of Judges as well as officers, and that legal practitioners from

all parts of the country may from time to time plead and appear in any Court, it was thought desirable to make the prohibition absolute as regards them all. Consequently the section was amended in 1900, and it now prohibits the lawyers and officers of *any* Court from purchasing an actionable claim, and the above cases should be regarded as overruled.

The word 'buy' refers to private sales and not to *sales in execution*; therefore, there is nothing to prevent a pleader from purchasing the property of his client sold in Court, although no doubt the Courts will always look askance at such a transaction—*Aghore Nath v. Ram Churn*, 23 Cal. 805; *Subbarayyudu v. Kotayya*, 15 Mad. 389; *National Insurance Co. v. Haridas*, 46 C.L.J. 225, A.I.R. 1927 Cal. 691; and the onus will lie very heavily on him to show that the transaction was free from suspicion—*Subbarayyudu v. Kotayya*, 15 Mad. 389. The only persons who are forbidden to purchase at Court-sale are "officers or other persons having any duty to perform in connection with any sale" (C. P. Code, O. XXI, r. 73) and a pleader does not fall under the category of those persons—*Alagirisami v. Ramanathan*, 10 Mad. 111.

A pleader is not precluded from purchasing decrees of Courts which are not actionable claims—*Ibid*; *Govindarajulu v. Ranga Rao*, 40 M.L.J. 124, 62 I.C. 255. But the right to *arrears of rent* in respect of property purchased by a pleader along with the property is an actionable claim, and he cannot under this section enforce it in any Court—*Hira Lal v. Tripura Charan*, 40 Cal. 650 (F.B.), 17 C.W.N. 679, 19 I.C. 129; *Sheogobind v. Gouri Prosad*, 4 Pat. 43, 6 P.L.T. 139, A.I.R. 1925 Pat. 310.

This section prohibits a legal practitioner from *purchasing* an actionable claim; but a *sale* of an actionable claim by a pleader is not invalid. It is doubtful whether a mere sale would amount to "trafficking in"—*Hirday Narain v. Jugat Prosad*, A.I.R. 1927 Pat. 2, 8 P.L.T. 201, 97 I.C. 373.

137. Nothing in the foregoing sections of this chapter applies to stocks, shares, or debentures, or to instruments which are for the time being by law or custom, negotiable, or to any mercantile document of title to goods.

Saving of negotiable instruments, etc.

Explanation.—The expression, "mercantile document of title to goods," includes a bill of lading, dock-warrant, warehousekeeper's certificate, railway-receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

660. Scope of section:—This section merely provides that the *methods* of assignment in this chapter shall not apply to the case of certain specified documents which are for the time being by law or custom negotiable. It merely deals with the *manner* in which the documents to which it relates can be transferred, but it does not affect the result of the transfer when made—*Arunachalam v. Ko Po Yan*, 1 Bur.L.J. 90, A.I.R. 1923 Rang. 1 (4).

661. Negotiable instruments:—These instruments have been exempted from the operation of this Chapter because their assignment is regulated mostly by the provisions of the Negotiable Instruments Act. The usual mode of transfer of negotiable instruments is endorsement or delivery. See secs. 27 and 48, Neg. Ins. Act. But such instruments are nevertheless *choses in action*, and as such may be transferred by assignment *i.e.*, by an instrument in writing under sec. 130. The important difference between transfer by endorsement and transfer by assignment of a negotiable instrument is that in the case of an assignment, the assignee will acquire no more than the right, title and interest of his assignor, *i.e.*, subject to all the liabilities and equities to which the assignor was subject (sec. 132), whereas in the case of an endorsement, the endorsee will have all the rights and advantages of a holder in due course, and not subject to the liabilities and equities of his transferor—*Mahammad Khumbar Ali v. Ranga Rao*, 24 Mad. 654; *Muthar Sahib v. Kadir Sahib*, 28 Mad. 544; *Raman Chetty v. Nagaratna*, 11 M.L.T. 246, 15 I.C. 380; *Akhoy Kumar v. Haridas*, 18 C.W.N. 494.

According to the custom of merchants in the cotton trade at Bombay, a railway receipt is a negotiable instrument—*Ramdas v. Amarchand*, 40 Bom. 630 (P.C.). But according to the custom of the merchants of Rangoon in the paddy trade, a railway receipt is not a negotiable instrument—*Arunachalam v. Ko Po Yan*, 1 Bur.L.J. 90, A.I.R. 1923 Rang. 1 (4).

662. Mercantile documents of title to goods:—The definition of a mercantile document of title to goods embodied in the Explanation is taken from sec. 1 (4) of the English Factors Act 1889.

The documents specified in the Explanation also occur in Exception 1 of sec. 108 of the Indian Contract Act.

Delivery order:—A delivery order is a mercantile document of title. It passes from hand to hand by endorsement, and the transferee acquires a title to the goods to which it relates—*Anglo-Indian Jute Mills v. Omademull*, 38 Cal. 127, 10 I.C. 859. In some cases the delivery order may be transferred by mere delivery of the document—*Khoo Po Khwet v. Nanigram*, 9 L.B.R. 143.

Railway receipt:—A railway receipt is a document of title and passes by endorsement, so that the endorsee acquires title to the goods covered by the receipt—*Amarchand v. Ram Das*, 38 Bom. 255, 21 I.C. 343; on appeal, *Ram Das v. Amarchand*, 40 Bom. 630 (P.C.). But a railway receipt which contains a condition contemplating delivery only to the consignee or to his endorsee as his agent (if the consignee is himself unable to take delivery), is not a document of title within the meaning of this section or section 108 of the Contract Act—*Bombay Steam Navigation Co. v. Ramdas*, 14 Bom.L.R. 532, 16 I.C. 61.

Mate's receipt:—A document denominated 'mate's receipt' granted by a shipping company which merely acknowledges the receipt of the goods shipped and promises to carry them to the place of destination is a simple ordinary receipt for goods and not a negotiable instrument or a mercantile document of title within the meaning of this section, and cannot be transferred by mere endorsement. If the consignee endorses the receipt to another person, such person gets no title to the goods covered by the receipt and cannot compel the company to deliver the goods to himself—*Natcheappa v. Irrawaddy Flotilla Co.*, 41 Cal. 670 (P.C.), 22 I.C. 311, 18 C.W.N. 457.

THE SCHEDULE.

REPEAL OF ACTS.

(See Section 2.)

(a) STATUTES.

Year and Chapter.	Subject.	Extent of repeal.
27 Hen. VII, c. 10 ..	Uses	The whole.
13 Eliz., c. 5	Fraudulent Conveyances ..	The whole.
27 Eliz., c. 4 ..	Fraudulent Conveyances ..	The whole.
4 Wm. & Mary, c. 16 ..	Clandestine Mortgages ..	The whole.

(b) ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
IX of 1842 ..	Lease and Release ..	The whole.
XXXI of 1854 ..	Modes of conveying lands ..	Section 17.
XI of 1855 ..	Mesne-profits and Improve- ments.	Section 1; in the Title, the words, "to mesne-profits and" and in the Preamble "to limit the liability for mesne-profits, and."
XXVII of 1866 ..	Indian Trustees Act ..	Section 31.
IV of 1872 ..	Punjab Laws Act ..	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 ..	Central Provinces Laws Act	So far as it relates to Bengal Regulation I of 1798 and XVII of 1806.
XXVIII of 1876 .	Oudh Laws Act ..	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877 ..	Specific Relief Act ..	In sections 35 and 36, the words "in writing."

(c) REGULATIONS.

Number and year.	Subject.	Extent of repeal.
Bengal Regulation I of 1798.	Conditional Sales.	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of <i>Debts</i> : Interest: Mortgagees in Possession.	Section 15.

APPENDIX I.

REPORT OF THE SPECIAL COMMITTEE.

To
HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL.

In accordance with the Legislative Department Resolution No. F. 43|27-G., dated the 25th April, 1927, we, the members of the Committee appointed by the Government of India to examine the provisions of the Bill to amend the Transfer of Property Act (IV of 1882), have the honour to submit the following Report:—

* * * * *

4. Although the Transfer of Property Act was enacted on the 17th February, 1882, it was in 1870 that its first draft in the form of rules was prepared by the First Indian Law Commission, consisting of Lord Romilly M.R., Sir Edward Ryan, formerly Chief Justice of Bengal, Lord Sherbrooke, Sir Robert Lush and Sir John McLeod who assisted Lord Macaulay in framing the Indian Penal Code. The Bill was again examined in 1879 by the Second Indian Law Commission consisting of Sir Charles Turner, the then Chief Justice of Madras, Sir Raymond West, Judge of the Bombay High Court, and Mr. Whitley Stokes, Law Member of the Governor General's Council. It appears that no less than seven Bills were prepared before the final Bill was passed into law in 1882. We fully recognise that any attempt to amend an Act which was the result of such long and careful consideration at the hands of eminent lawyers and jurists has to be made with the utmost caution. On the other hand, the passage of time has brought recognition to new principles in the law of property, and the conflict of judicial decisions with regard to some of its provisions and defects revealed by experience of its working for nearly half a century has made a revision of the Act necessary.

5. During the period of forty-five years that the Act has been in force a large mass of conflicting decisions have arisen with regard to various provisions. As early as 1903 in his letter dated the 21st August, 1903, Mr. Justice Rampini (afterwards Sir Robert Fulton) while commenting on the Bill introduced for the amendment of section 59 of the Transfer of Property Act, suggested to the Government of India the propriety of undertaking a general and thorough revision of the Act. In paragraphs 3 and 4 of his letter he observed as follows:—

“The Transfer of Property Act was passed nearly 25 years ago, and was the first Act of the Legislature to embody the provisions of the Bengal Regulations of 1798 and 1806 and of the Bombay Regulation of 1827. It is usual to revise the Codes of the Indian Legislature after periods of about 20 years, and it is the more necessary to do so in the case of the Transfer of Property Act because—

(1) it is the first Act dealing with a branch of law it relates to, and (2) during the past 25 years a large mass of conflicting case-law on the subject has grown up which it is advisable now either to embody in the Act or to set aside.

“Dr. Rash Behari Ghosh has observed in the preface to the 3rd edition of his work on ‘the Law of Mortgage in India’ that ‘there is scarcely a single section in the Chapter on mortgages in the Transfer of Property Act on which conflicting rulings cannot be found.’ I would go even further and say that not only in respect of the Chapter on mortgages but in

respect of almost all the Chapters of the Act there is a conflict of opinion between several High Courts."

6. Since the passing of the Transfer of Property Act in 1882, its provisions have been amended on twelve occasions. But it does not appear that the general revision of the Act was undertaken or any new principle of importance or substance introduced.

7. Most of the provisions of Act IV of 1882 had been based on the decisions of the Courts of Equity before 1881, which had already been followed by Indian courts. The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), was passed in the previous year, but with the exception of a few provisions, such as sections 57, 61 and 69 of the Transfer of Property Act, the provisions of that Act were not used in drafting Act IV of 1882. Since 1882 the Conveyancing Act has been revised in England several times and the whole law of property is now consolidated and codified in the new Property Act, 1925 (15 & 16 Geo. V, c. 20).

8. In examining the Bills which were submitted for our consideration we have scrutinised the provisions of the Transfer of Property Act section by section in order to ascertain if any of the sections not included in the Bills required amendment in view of the amendments proposed in the Bills or in the light of judicial decisions or other circumstances. With regard to the provisions which are based on the principles of English law or the decisions of English courts, we have carefully examined the provisions of the English Property Act to see whether any change is necessary on the lines of the provisions of that Statute. Where it was found that the existing provisions of the Act or the new provisions proposed to be introduced in the Bills could be drafted on the lines of the English Act, we have tried to do so. In our opinion this will facilitate the interpretation of those provisions as the courts will have the benefit of English decisions.

* * * * *

10. In the Bills submitted to us the policy which appears to have been followed was that no amendment should be attempted which would merely effect an improvement in wording, but that principles of importance which had been judicially recognised since the passing of the Act should be incorporated. In our opinion it is a sound course to follow, particularly in an Act which has been in force for forty-five years and to whose phraseology the general public and the legal profession have become accustomed. Again, it is not safe to alter any wording which has received judicial interpretation, when the interpretation has not led to any inconvenience in practice or miscarriage of justice. We also agree that the Act must be amended to embody new principles. In the amendments which we propose we have also endeavoured to remedy any defect which has led to inconvenience or anomalous results. We have also acted on the principle that it is undesirable to attempt to provide in detail for every possible contingency. No elaboration can be exhaustive and the only result of over-elaboration would be to cramp the action of the courts and to encourage technicalities. Where there has been a conflict of decisions we have endeavoured to set it at rest.

11. Detailed reasons for all amendments proposed by us are given in the notes on clauses but we think it desirable to draw special attention to some of the important points of principle which are included in the two Bills.

In the Transfer of Property Act the following important amendments are suggested:—

(i) The omission of the words "Hindus and Buddhists" in section 2 whereby the provisions of Chapter II will apply to all cases except those governed by a special rule of Muhammadan Law (clause 3 of the main Bill);

(ii) (a) the provision making registration amount to notice of a registered document;

- (b) the provision making constructive notice to an agent notice to the principal (clause 4 of the main Bill) ;
- (iii) the validity of transfers in favour of a class, when some members of that class are unable to take (clause 8 of the main Bill) ;
- (iv) the validity of a direction as to accumulation for a certain period and for certain purposes (clause 9 of the main Bill) ;
- (v) the statutory recognition of the doctrine of part performance (clause 15 of the main Bill) ;
- *(vi) the compulsory registration of sales and mortgages relating to immoveable property of whatever value, and of all leases except those from month to month or for any term not exceeding one month (clauses 16, 19 and 54 of the main Bill) ;
- (vii) the abolition of the remedy of foreclosure in the case of all mortgages except a mortgage by conditional sale or an anomalous mortgage providing expressly for foreclosure (clause 30 of the main Bill) ;
- (viii) the provision compelling a mortgagee to exhaust his remedies against the mortgaged property before enforcing his personal remedy (clause 32 of the main Bill) ;
- (ix) the amendment of the provisions regarding sale without the intervention of the court (clause 34 of the main Bill) ;
- (x) the extension of the principle of 'subrogation' (clause 46 of the main Bill) ;
- (xi) the modification of the law of 'merger' (clause 50 of the main Bill) ;
- (xii) the provision requiring leases to be executed by both parties (clause 54 of the main Bill).

12. In Order XXXIV of the Code of Civil Procedure the important amendments are suggested on the following points:—

- (i) it is made clear that the right of redemption is not extinguished till a final decree is passed or till a sale held in execution of the mortgage decree is confirmed ;
- (ii) detailed provisions are included for the award of interest (clauses 4 and 6 of the Supplementary Bill).

13. The forms in Appendix D to the First Schedule to the Code of Civil Procedure relating to mortgage decrees are made to conform strictly to the amended rules in Order XXXIV. We have revised the forms and amplified them, and have added some extra forms. We hope these forms will facilitate the drawing up of decrees in Mofussil Courts. In cases where several persons entitled to redeem are parties to a mortgage suit, we propose to abolish the system of allowing successive periods of redemption (clause 8 and Schedule 1 of the Supplementary Bill).

* * * * *

[N.B.—The Notes on Clauses have been incorporated into the commentary under the particular sections of the Transfer of Property Act.]

* This suggestion has not been accepted by the Legislature.

APPENDIX II.

Order XXXIV, C. P. Code.

[As amended by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929.]

SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY.

1. Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Parties to suits for foreclosure, sale and redemption.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

This was section 85 of the Transfer of Property Act.

The words "either in the mortgage security or in the right of redemption" have been substituted for the words "in the property comprised in a mortgage," which occurred in sec. 85 of the T. P. Act. And the proviso at the end of that section—"Provided that the plaintiff has notice of such interest"—has been omitted, and the *Explanation* has been added.

The words "*property comprised in the mortgage*" in the old section meant an interest either in the security or in the equity of redemption, and not merely the equity of redemption—*Ammayee v. Rahina*, 14 M.L.J. 467. This has been made clear in this Rule, and the decision in *Mata Din v. Kazim Hussain*, 13 All. 432 is no longer good law.

The proviso at the end of sec. 85 of the T. P. Act created an impression that where a plaintiff had no notice of the interest of puisne mortgagees or others interested in the mortgaged property and has not joined them, they might nevertheless be bound by a decree obtained against the mortgagor in their absence. To obviate the possibility of such an error the words have been omitted as they were considered unnecessary—*Sital Prasad v. Asho Singh*, 2 Pat. 175 (179), 69 I.C. 677, A.I.R. 1922 Pat. 651.

An auction purchaser in execution of a mortgage-decree in a suit for sale on a mortgage, in which the purchaser of a portion of the mortgaged property in execution of a money decree against one of the mortgagors was not joined as a party, is entitled to institute a subsequent suit for sale against that purchaser, the mortgagor and the mortgagee, whether or not the mortgagee, at the time of the previous suit, had notice of the interest of the latter purchaser who had not been joined as a party. The effect of the omission of the proviso to section 85 of the T. P. Act relating to the mortgagee having notice of the interest of the person who had to be joined as a party to the suit, is that the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgagee's suit—*Venkat Reddy v. Kunjappa*, 47 Mad. 551 (558), 46 M.L.J. 391, A.I.R. 1924 Mad. 650.

Persons having interest:—This rule requires that all persons having an interest either in the mortgage-security or in the right of redemption should be joined as parties to the suit. The object of the rule in so requiring is to avoid multiplicity of suits—*Lala Suraj Prasad v. Golab Chand*, 28 Cal. 517 (529, 530); *Shahasaheb v. Sadashiv*, 43 Bom. 575 (578), 51 I.C. 223,

Persons claiming the property under titles, *prior* to, and *independent* of the mortgagor's title are not persons having an interest in the mortgage security—*Nilakant v. Suresh*, 12 Cal. 414 (P.C.); *Satagauda v. Satappa*, 44 Bom. 698; so also, persons claiming by title *paramount* to that of the mortgagor or mortgagee are not necessary parties—*Nilakant v. Suresh*, 12 Cal. 414 (421, 422) (P.C.); *Radha Kunwar v. Reoti*, 38 All. 498 (P.C.); *Jaggewar v. Bhuban*, 33 Cal. 425 (440); *Maung San v. U. Pon*, 2 Rang. 106 (107); *Galstaun v. Mirza Abid*, 10 O.L.J. 263, A.I.R. 1924 Oudh 19. So also, persons claiming under a title *adverse* to that of both the mortgagor and the mortgagee are not necessary parties—*Jaggewar v. Bhuban*, 33 Cal. 425 (433); *Radha Kunwar v. Reoti*, 38 All. 498 (P.C.), 35 I.C. 939; *Viswanathan v. Ma Aye*, 4 Rang. 214, 98 I.C. 11, A.I.R. 1926 Rang. 208 (209); *Gobordhan v. Munna Lal*, 40 All. 584; *Satagauda v. Satappa*, 44 Bom. 698; *Khairati v. Banni*, 30 All. 240; *Joti Prasad v. Aziz Khan*, 31 All. 11; *Rukmani v. Ankama*, 23 L.W. 664, A.I.R. 1926 Mad. 744 (746), 96 I.C. 26. But if the person asserting a paramount or adverse title is connected with the mortgage, he must be joined as a party—*Krishna v. Vithal*, 28 Bom. L.R. 759, A.I.R. 1928 Bom. 522 (523). A person claiming adversely or by paramount title should be joined as a party, if he is alleged to be a benamidar of the mortgagee—*Bhuban Mohan v. Co-operative Bank*, 29 C.W.N. 784, A.I.R. 1925 Cal. 973, 88 I.C. 866; or if he is in possession and is likely to resist the claim of the plaintiff in the mortgage suit—*Khub Lal v. Jhapsi*, 3 Pat. 244, A.I.R. 1924 Pat. 613, 78 I.C. 885.

Those co-owners of the mortgaged property who did not execute the mortgage-bond and did not receive the money and were not interested in the equity of redemption, are not necessary parties to a suit to enforce the mortgage—*Monmohini v. Parvati*, 32 Cal. 746; *Jagomohan v. Daudoon*, 12 C.W.N. 94. And a suit by a mortgagee should not be complicated by introducing into it a controversy in which the mortgagee is really uninterested—*Krishna v. Muthukumarasawmiya*, 29 Mad. 217 (at p. 224). But all persons who have a joint interest in the property with the mortgagor and have not been released by the mortgagee, and all persons who have a joint interest with the mortgagee must be made parties—*Harikissen v. Veliat*, 30 Cal. 755; *Venkata v. Kannam*, 5 Mad. 184; but persons interested in a portion of the mortgaged property which the mortgagee has released from the mortgage or does not include in the suit need not be made parties—*Harikissen v. Veliat*, 30 Cal. 755; *Surjiram v. Barhamdeo*, 2 C.L.J. 202; *Sheo Prasad v. Behari Lal*, 25 All. 79; *Ponnusami v. Srinivasa*, 31 Mad. 333; *Sheo Tahal v. Sheodan*, 28 All. 174 (F.B.). Where out of three properties subject to one mortgage two had been redeemed by payment of a proportionate part of the mortgage-debt and the third alone was the subject of a suit for redemption upon payment of the balance of the mortgage money, it was *held* that this rule did not make it necessary to join as a defendant to such suit a person having an interest in one of the properties already redeemed—*Nazir v. Nihal*, 2 A.L.J. 628.

In a suit for sale on a mortgage by the prior mortgagee, a subsequent mortgagee may be a proper party but not a necessary party—*Sital Prasad v. Asho Singh*, 2 Pat. 175 (181), A.I.R. 1922 Pat. 651, 69 I.C. 677.

A puisne mortgagee must be joined as a party to a redemption suit—*Hassanbai v. Umaji*, 28 Bom. 162; but in a suit by a *sub-mortgagee*, the original mortgagor is not a necessary party—*Ram Jatan v. Ramhit*, 27 All. 511. So also, in a suit by a mortgagee to redeem his sub-mortgage, the original mortgagor is not a necessary party, though there is no impropriety in impleading him—*Ganesh v. Vasudeo*, 24 Bom. L.R. 911, A.I.R. 1922 Bom. 424.

The *Kanomdar* is a necessary party to a suit for redemption—*Vedapuratti v. Avara*, 25 Mad. 568.

A person who has several interests in a mortgaged property cannot reserve any portion of his rights, but must necessarily submit all his rights for adjudication by the

Court—*Bansidhar v. Gaya*, 24 All. 879 ; therefore a mortgagee cannot be permitted to sue on only one of the mortgages in his favour and obtain an order for sale subject to other mortgages of the same property in his own favour, especially when they are subsequent to the mortgage sued upon—*Keshavram v. Ranchod*, 7 Bom.L.R. 811 ; *Dorasami v. Venkateseshayar*, 25 Mad. 108, followed in *Nathu v. Annangara*, 30 Mad. 353 in which it has been held that, a party holding two mortgages on the same property and suing on the first mortgage alone, is in respect of the second mortgage a party to the suit under this rule ; and if he omits to mention his second mortgage and the property is ordered to be sold free of such mortgage, he cannot afterwards sue to enforce his second mortgage against such property. But see *contra*—*Sundar v. Bholu*, 20 All. 322, and *Ma Myit v. Sarma*, 10 L.B.R. 360, 69 I.C. 897 and *Bansidhar v. Jagmohan*, 12 O.L.J. 127, 86 I.C. 748, A.I.R. 1925 Oudh 379. In these cases it has been held that neither O. 34, rule 1 nor any other provision of law requires the holder of a first mortgage to disclose his second mortgage, and that there is nothing in the C. P. Code or in the T. P. Act to prevent the holder of two independent mortgages over the same property from obtaining a decree for sale on each of them in a separate suit. But these cases are no longer good law in view of the new sec. 67A, Transfer of Property Act.

A purchaser of a portion of the equity of redemption is a necessary party ; and therefore where a mortgagee brings a suit for sale upon his mortgage without impleading as a party to the suit a purchaser of a portion of the equity of redemption, he cannot, by purchasing the property in execution, claim possession as against such purchaser—*Kristo Pada v. Chaitanya*, 49 Cal. 1049, 69 I.C. 530, A.I.R. 1923 Cal. 274.

One of several heirs of a mortgagee cannot claim the mortgage-debt without joining all the heirs as parties—*Bhagela v. Abdul*, 1 P.L.J. 472 (Note).

This Rule lays down that all persons *having* an interest shall be joined. It appears therefore that persons *merely claiming* an interest, or persons claiming under a contract or otherwise having an *inchoate* right need not be joined. See *Dagdu v. Panchamsing*, 17 Bom. 375 and *Nanjundapa v. Hemapa*, 9 Bom. 10. A person not having any interest in the mortgage at the date of the suit need not be joined as a party—*Pagho v. Gaud*, 13 Bom. 51 ; *Trimbak v. Sakharam*, 16 Bom. 599.

Persons mentioned in section 91 of the T. P. Act as persons entitled to redeem must be joined as parties, e.g., an auction-purchaser—*Dadoba v. Damodar*, 16 Bom. 486 ; or co-mortgagor—*Ahmad Hussain v. Muhammad Kasim*, 48 All. 171, A.I.R. 1926 All. 46, 90 I.C. 80. If not joined as plaintiffs, they must be joined as defendants—*Ragho Sahai v. Balkrishna*, 9 Bom. 128.

An *attaching creditor* was held to be a necessary party in a mortgage suit and if he was not made a party, any order of sale obtained by the mortgagee was not binding on the attaching creditor, who was entitled to bring the property to sale under his attachment—*Venkata v. Venkatarama*, 37 Mad. 418 ; *Ghulam v. Dina Nath*, 23 All. 467 ; *Meghraj v. Kesho Gopal*, 6 N.L.J. 181, A.I.R. 1923 Nag. 311. An attaching creditor was given a right to redeem under clause (f) of sec. 91 of the T. P. Act, and consequently he was a person having an interest in the right of redemption, within the meaning of this rule. It was therefore necessary to join him in the suit—*Meghraj v. Kesho Gopal*, (supra). It should be noted however that clause (f) of sec. 91, T. P. Act, has now been omitted by the T. P. Amendment Act (XX of 1929). An attaching judgment-creditor is no longer a person having a right of redemption, and can no longer be described as a person "having an interest in the right of redemption." It is not therefore necessary to make him a party.

The first mortgagee is bound to make the second mortgagee a party to his suit for sale, and if he does not do so, the second mortgagee is not bound by any order for sale obtained in such a suit—*Het Ram v. Shadi Ram*, 40 All. 407 (P.C.)

Where there are two or more persons interested in the equity of redemption, any one of them may sue for redemption, but then the other mortgagors must be made defendants—*Biri Singh v. Nawal Singh*, 24 All. 226; *Mariyil Raman v. Narayanan*, 26 Mad. 461; *Karattole Edamma v. Anni Kannan*, 26 Mad. 649 (F.B.). Where there are several mortgagors, and some of them redeem the mortgaged property, and a suit is brought by another co-mortgagor to redeem his share from the redeeming-co-sharers, the other non-redeeming co-mortgagors also must be impleaded; because the share and the right to redeem of the plaintiff cannot be determined behind the back of the non-redeeming co-sharers—*Ahmad Husain v. Md. Qasim*, 48 All. 171, A.I.R. 1926 All. 46 (47), 90 I.C. 80, 24 A.L.J. 88.

Persons connected with the mortgage are proper parties. Therefore, persons alleged to be tenants of the mortgagee may be properly joined as defendants in a suit for redemption—*Krishna v. Vithal*, 28 Bom.L.R. 759, 96 I.C. 848, A.I.R. 1926 Bom. 522 (523).

Prior mortgagee:—A puisne mortgagee is not bound to make a *prior mortgagee* a party to his suit for foreclosure or sale and he is entitled to bring the mortgaged property to sale or to foreclose without redeeming the prior mortgage—*Jagannath v. Mohan*, 2 P.L.J. 118. See the Explanation. A prior incumbrancer who is in no way interested in the puisne mortgage and against whom no relief is claimed is not a necessary party to a suit brought by the puisne mortgagee—*Jaggeswar v. Bhuban*, 33 Cal. 425. The contrary view taken in *Mata Din v. Kazim*, 13 All. 432, *Sorabji v. Rattanji*, 22 Bom. 701, and *Kanti Ram v. Kutabuddin*, 22 Cal. 33 is no longer good law. Under the present law, a puisne mortgagee is not required to implead the prior mortgagee in a suit for foreclosure or sale; and the principle will be the same if the subsequent mortgagee and the prior mortgagee happen to be one and the same person—*Nawab Wazir Begam v. Sashi Bhushan*, 2 Pat. 874, 74 I.C. 820, A.I.R. 1924 Pat. 77.

Trustee:—If the property is one vested in a trustee *etc.*, he shall represent all the persons interested in the property, and it shall not ordinarily be necessary to make them parties—O. XXXI, C. P. Code.

Joint Hindu Mitakshara family:—There is a conflict of decisions as to whether the junior members of a joint Hindu family should be joined in a suit brought by or against the manager of the family in his representative capacity. According to the Patna, Allahabad and Madras High Courts, a mortgage suit brought by or against the manager of a joint family without impleading the other members of the family does not fail on account of non-joinder—*Madan v. Kishen*, 34 All. 572 (F.B.); *Parameshwar v. Rajkishore*, 3 Pat. 829 (832), A.I.R. 1925 Pat. 59; *Brij Nath v. Daleep*, 1 P.L.T. 582; *Lal Behari v. Gur Prasad*, 4 P.L.T. 108, 71 I.C. 948, A.I.R. 1923 Pat. 290; *Sheik Ibrahim v. Rama Iyer*, 35 Mad. 685; *Hari Lal v. Munnar*, 34 All. 549; *Chetan Singh v. Sartaj Singh*, 46 All. 709, A.I.R. 1924 All. 908, 79 I.C. 1001. Where a mortgage-bond is executed in favour of two members of a joint Hindu family to secure money advanced from joint family funds, the mortgagees named in the bond are entitled to sue to enforce the bond without joining the other members of the family as parties—*Hit Lal v. Jaboo*, 3 Pat. 81 (83), 75 I.C. 378, A.I.R. 1924 Pat. 458, 5 P.L.T. 142. But the Calcutta High Court dissents from this view and holds that a suit brought by or against the manager alone without impleading the other members is bad for non-joinder, and they can bring a suit for a declaration that they are not bound by this decree in the suit—*Lala Suraj Prasad v. Golab Chand*, 27 Cal. 724 and 28 Cal. 517; *Shideshuri v. Dharamjit*, 41 Cal. 727; therefore, in a mortgage-suit by the manager of a joint family, his son is a necessary party and must be joined—*Bissonath v. Bindeshri*, 40 Cal. 342. But the Calcutta view is not good law in the face of the pronouncement of the Privy Council that in a suit on the

mortgage the manager of a joint Hindu family represents all the other members; even if one of them is a minor he need not be represented by a guardian *ad litem*—*Ganpat v. Bindbasini*, 47 Cal. 924 (P.C.).

If the members are not joined, they are not entitled to contend that the decree is absolutely void against them, but they can avoid it by showing that there was no debt in fact or that it was tainted with immorality—*Ramasamayyan v. Virasami*, 21 Mad. 222; *Palani v. Rangayya*, 22 Mad. 207; and the only course open to them is to redeem—*Lala Suraj v. Golab*, 28 Cal. 517; *Hiralal v. Parmeshar*, 21 All. 356; *Kanhaia v. Raj Bahadur*, 24 All. 211; *Lall Singh v. Pulandar*, 28 All. 182; but no suit for redemption by them is maintainable upon the ground solely that they were not made parties to the suit under the decree in which the property was sold—*Ibid*; *Jaddo v. Sheo Sankar*, 33 All. 71; but see *Ram Prasad v. Manmohan*, 30 All. 256. If the property be not the ancestral property of the family, the sons of the mortgagor are not necessary parties, they not having any interest in it—*Ramnarain v. Palu*, 1 A.L.J. 367.

Where a mortgage is effected by two Hindu coparceners, and the mortgagee sued them without impleading the minor son of one of the executants, the suit is not bad for non-joinder of parties, but may be decreed as against the actual mortgagors. (But of course the minor coparcener can afterwards set aside the alienation on any legitimate ground)—*Nathu v. Ram Sarup*, 47 All. 427, 87 I.C. 700, A.I.R. 1925 All. 335.

Acquiring interest after suit :—This Rule does not require the joinder in a suit on a prior mortgage of a subsequent mortgagee whose mortgage was only executed subsequently to the filing of such suit—*Ishaq v. Chunni*, 21 All. 149; but it is desirable that he should be joined—*Sheo Narain v. Chuni*, 22 All. 243; *Ahmedbhoy v. Vulleebhoy*, 8 Bom. 323.

Suit by Benamidar :—It is now well established that a person who is named in a mortgage-bond as the mortgagee, although he is in fact a *benamidar* for those beneficially interested, can bring a suit in his own name on the mortgage, and the suit should not be dismissed merely because the beneficial owner is not added as a party—*Hit Lal v. Joboo*, 3 Pat. 81 (83), A.I.R. 1924 Pat. 458; *Bhola v. Ramlal*, 24 Cal. 34; *Sachitananda v. Baloram*, 24 Cal. 644; *Yad Ram v. Umrao*, 21 All. 380; *Dagdu v. Balavant*, 2 Bom. 820; *Vaitheswara v. Srinivasa*, 42 Mad. 348 (F.B.); *Chowdhuri Kirtibas v. Gopal*, 18 C.W.N. 814. A suit can also be brought against a benamidar—*Dujai v. Shiam Lal*, 38 All. 122.

Effect of non-joinder :—If all the necessary parties to the suit are not before the Court, this is a ground for the dismissal of the suit—*Rammoy v. Premchand*, 5 C.W.N. 423; *Matadin v. Kazim*, 13 All. 432; *Bhawani v. Kallu*, 17 All. 537; *Balmakund v. Sangari*, 19 All. 379 (at p. 384); *Vedapuratti v. Avara*, 25 Mad. 568. But the courts generally apply the provisions of O. I, r. 10 (2) and allow the plaintiff to add the necessary parties. See *Jumuna v. Ganga*, 19 Cal. 401; *Kundan v. Faqir*, 27 All. 75; *Sorabji v. Rattonji*, 22 Bom. 701. In England, also, the plaintiff is given leave to amend his plaint, and the addition of new parties is always possible until a final decree has been made—*Keith v. Butcher*, 25 Ch. D. 750; *Van Gelder v. Sowerby*, 44 Ch. D. 374 (at p. 394).

The object of O. 34, rule 1 is to prevent multiplicity of suits and to secure that no injury is done to the rights of any party through his not being impleaded. The provision is expressly made subject to other provisions of the Code, which include O. 1, rule 9, and it has been held that where it is possible for the Court to do justice as between the parties before it, it should do so, and should not make O. 34, rule 1 a ground for dismissing the entire suit—*Parshadi Lal v. Laiq Singh*, 21 A.L.J. 701, 74 I.C. 943. Order 1, rule 9 C. P. Code is not subject to O. 34, rule 1. The

combined effect of these rules, in so far as mortgages are concerned, is that all persons whose rights and interests may be adjudicated upon and determined in the suit, ought to be added as parties, but that failure to add one or more such persons should not have the effect of defeating the suit if the Court in their absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. If no decree can be passed without affecting the rights of absent parties, the suit cannot proceed in their absence and should be dismissed. If, however, the rights of the parties actually before it can be determined in the suit leaving the rights and interests of others unaffected, then even though the other parties might properly have been added, the Court should determine the matters in controversy between the parties actually present—*Sital Prasad v. Asho Singh*, 2 Pat. 175 (179), A.I.R. 1922 Pat. 561 ; *Parmeshwar v. Raj Kishore*, 3 Pat. 829 (832, 833), A.I.R. 1925 Pat. 59. If one of the heirs of a mortgagor is not impleaded, a decree can be passed proportionate to the shares of the other heirs who have been sued on the mortgage—*Kherodamoyi v. Habib Saha*, 29 C.W.N. 51, 82 I.C. 638, A.I.R. 1925 Cal. 152. Where a person who had an interest in the mortgaged property was not made a party in a suit brought by the mortgagee, his rights are not affected and he is still entitled to redeem—*Jnanendra v. Shorashi Charan*, 49 Cal. 626, A.I.R. 1922 Cal. 23.

Where a party applies to amend the plaint, after having refused to avail himself of an opportunity to do so given to him by the Court, it is not a proper exercise of judicial discretion to refuse the application, as the mistake or error can be rectified upon terms, *i.e.* upon payment of costs—*Bhogmoni v. Subhnarain*, 1905 A.W.N. 35 ; and where a suit on a mortgage was dismissed for non-joinder of necessary parties, but on an application for review the necessary parties were added and the suit was decided on the merits ; *held* on second appeal that the review was not wrongly granted—*Grish v. Juramoni*, 5 C.W.N. 83.

Where the mortgagee made one only of two persons, who represented the estate of the mortgagor, a party defendant, not having notice of the existence of the other, it was held that the latter was bound by the decree obtained by the mortgagee, and that his interest passed at the sale held in execution of the decree—*Ramtaran v. Rameshwar*, 11 C.W.N. 1078. But it is doubtful whether this is good law now by reason of the omission of the old proviso. See p. 692.

Where a puisne mortgagee was not impleaded in a suit by a prior mortgagee who had no knowledge of the puisne mortgage though registered, a decree for sale passed in such a suit and the proceedings held thereunder are valid subject to the rights of the puisne mortgagee—*Ramnarain v. Bandi*, 31 Cal. 737 (742) ; *Umesh Chunder v. Zahur Fatima*, 18 Cal. 164 (P.C.) ; *Het Ram v. Shadi Lal*, 40 All. 407 (P.C.) ; *Matru Mal v. Kunwar*, 42 All. 346 (P.C.) ; *Maung Shwe v. Karambu*, 6 Rang. 122, A.I.R. 1928 Rang. 127, 110 I.C. 701. The omission to implead the second mortgagee does not prejudice his rights ; neither his right to sue for sale nor his right to redeem the first mortgage is lost—*Debendra v. Ramtaran*, 30 Cal. 599 (F.B.) ; *Mallikarjunadu v. Singa Murti*, 26 Mad. 332.

If the prior mortgagee fails to make a subsequent mortgagee of a part only of the mortgaged property a party, the effect of the omission is not the total dismissal of the suit, but only of so much of it as relates to the property comprised in the subsequent mortgage—*Alam Singh v. Gokal*, 35 All. 484.

Where the first mortgagee sued without making the second mortgagee a party, and L bought in execution, and afterwards the second mortgagee sued without making the first mortgagee a party, and T bought in execution, it was held that T could redeem the first mortgage—*Kudrat v. Kubra*, 23 All. 25.

The purchaser of the mortgaged property is a necessary party in a suit for sale brought by the mortgagee, and if the purchaser is not made a party in the suit,

he will be entitled to redeem the property from the auction purchaser who purchased in execution of the mortgage-decree in that suit—*Rebati Mohan v. Nadiabashi*, 22 C.W.N. 543.

2. In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—
 Preliminary decree in foreclosure-suit.

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the date next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree, and directing—

(c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all rights to redeem the property.

2. (1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—
 Preliminary decree in foreclosure-suit.

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing—

(i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-

transfer the property to the defendant *at his cost* free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and

- (ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all rights to redeem the property.

(2) *The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.*

(3) *Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.*

*Amendment :—*This rule has been amended by sec. 4 of the T. P. Amendment Supplementary Act (XXI of 1929), for the following reasons :—

"We propose to make the following amendments in this rule, *viz.* :—

"(1) It should be expressly stated that the decree passed under this rule is 'preliminary.'

"(2) In clause (a) of the old rule, the Court is merely directed to take an account of what would be due to the plaintiff on account of (a) principal and interest on the mortgage and (b) the costs of the suit. Under sections 72 and 76 of the Transfer of Property Act, a mortgagee is authorised to spend money for certain necessary purposes in connection with the mortgage security. Under section 63A of the Transfer of Property Act, a mortgagee is allowed to spend money for improvements in certain circumstances. The above provisions also provide that the money so spent by a mortgagee should be added to the principal money. Clause (a) is, therefore, amended to make it clear that in taking an account sums spent by a mortgagee for necessary costs, charges and expenses in respect of the mortgage-security, together with interest thereon, must be taken into account.

"(3) Clause (a) provides that the account of the sum due to the plaintiff will be taken up to the date fixed for payment in the preliminary decree. The date so fixed is to be within 6 months from the date of the decree. Clause (b), however, which relates to the declaration by a Court of the amount due to a mortgagee, merely provides that the amount due at the date of the decree is to be declared. Although clause (c) provides that the Court has to fix a date for the payment of the amount so declared within six months, no provision is made for awarding costs, charges and expenses incurred by a mortgagee in respect of the mortgage security subsequent to the date of the declaration or the decree. This seems anomalous. There is no reason why a mortgagee should lose subsequent costs, charges and expenses where the Court declares the amount. The scheme of Order XXXIV of the Civil Procedure Code is to draw a clear distinction between a preliminary and a final decree; rule 2 is amended to make it clear that the amount to be declared or found due on taking accounts should be up to the date of the preliminary decree. The defendant will then be in a position to know what sum he has to pay in order to claim redemption. Care is taken to provide in clause (c) that after tendering the amount so declared or found to be due, the defendant has to pay the amount which the Court may adjudge for subsequent interest and subsequent costs, charges and expenses. Rules 10 and 11 have been amended to empower a Court to adjudge the amount due in respect of such interest and costs.

"(4) Although clause (a) of the old rule refers to the date fixed for payment of the amount found to be due on taking accounts, clause (c) refers to the date within six months from the date of the declaration of the amount due by the Court under clause (b). This appears to be an error. The date fixed for payment must be within six months from the date when the Court declares the amount due or, where it directs an account to be taken, from the date when such account is confirmed by the Court. Our amendment makes this clear.

"(5) As the mortgagor or any other person seeking redemption has to bear all costs and expenses of the redemption, in clause (c) it is made clear that the cost of re-conveyance or re-transfer by the mortgagee on payment of the amount due by the mortgagor shall be borne by the mortgagor or such other person.

"(6) The proviso to sub-rule (2) of rule 3 provides for the extension of the time fixed for payment in the final decree. The power of the Court to extend the time fixed for payment is well recognised and is exercised at any time before a final decree for foreclosure is passed. The proper place for this provision is in the rule relating to the preliminary decree. The proviso is, therefore, placed in rule 2 as sub-rule (2). The expression 'postpone the day' in this proviso has been replaced by the words 'extend the time' to make it clear that the time can be extended even

after the expiry of the period once fixed. Sub-rule (2) also makes it clear that the extension of the time fixed for payment must be subject to such terms as the Court may fix. It is not fair that after the plaintiff has obtained a decree for payment of the amount due on the mortgage and when the payment has been already postponed for six months, the plaintiff should be made to wait for payment for a further period without getting compensation. A defendant who applies for an extension of time must be put on terms before his application is granted.

“(7) As clauses (a) and (b) of sub-rule (1) will provide for the adjudication of the amount due to a mortgagee till the date of the preliminary decree, in sub-rule (1) clause (c) it is made clear that after the payment of that amount the defendant is bound to pay subsequent costs and subsequent interest due to the plaintiff till the date of actual payment, which may be on or before the date fixed in the preliminary decree or such other date to which the time for payment may have been extended under sub-rule (2). It has been well established that the mortgagee can add to the mortgage-money the amount spent by him between the passing of the preliminary decree and the final decree (I.L.R. 44 Cal. 448).

“(8) It has been held that the right of a mortgagor to redeem the mortgaged property subsists till a final decree for foreclosure is passed (I.L.R. 27 Cal. 705). Default in payment on the day originally fixed in the preliminary decree for payment or on the day to which the time for payment may have been extended by the Court does not *ipso facto* extinguish the mortgagor's right of redemption. It is open to a mortgagor to apply for extension of time till a final decree for foreclosure has been passed, and he can do so even after the expiry of the period once fixed (I.L.R. 39 Mad. 882 ; 28 Bom. 102). Clause (d) of rule 2, as at present worded, is not consistent with the above rulings. It provides that, if payment, as provided in the rule, is not made, the defendant will be debarred from all right to redeem the property. In sub-rule (2) of the amended rule, therefore, it is made clear that, on non-payment of the amount due, the plaintiff will have only a right to *apply* for a decree for foreclosure. We propose to make it clear that the right of the plaintiff to file an application arises not only when the amount adjudged due in the preliminary decree is not paid in full, but also if any portion of the sums for subsequent costs and subsequent interest remains to be paid.

“(9) Rules 2 to 8 of Order XXXIV do not specifically provide for decrees in suits for foreclosure or sale in which, besides the mortgagor, other persons who are entitled to redeem, such as subsequent mortgagees or persons subrogated to their rights, are joined as parties. This omission was sought to be remedied by providing forms for decrees in such suits—Forms No. 9 to 11 in Appendix D to the Code. Under Order XLVIII, rule I, of the Civil Procedure Code, forms are not binding and can be varied by the Courts. An express provision in Order XXXIV itself is necessary to give full statutory force to the forms. As such cases will be of varied type and cannot all be anticipated, it will suffice to enact in Order XXXIV that in such cases the rights of the parties will be regulated in accordance with the forms given in the Appendix, with such variation as the circumstances of the cases may require. Provisions to that effect are embodied in sub-rule (3) of rule 2 and sub-rule (3) of rule 4. In a redemption suit by a mortgagor such difficulties will not arise. Consequential amendments have been made in rules 7 and 8.”—*Report of the Special Committee.*

Suit for foreclosure :—Under clause (a) of sec. 67, Transfer of Property Act, as now amended by the T. P. Amendment Act of 1929, the right to bring a suit for foreclosure is given only to a mortgagee by conditional sale, and to a holder of an anomalous mortgage the terms of which expressly entitle the mortgagee to

foreclose. The holder of an English mortgage is now deprived of the right of foreclosure.

A sub-mortgagee or an assignee of the sub-mortgage is "a person who claims by derived title" within the meaning of this rule, and is entitled to the same remedy as the original mortgagee—*Muthu v. Venkatachellum*, 20 Mad. 35, 6 M.L.J. 235.

A mortgagee of intangible property (e.g. a *pala* or turn of worship) is entitled to a decree for foreclosure quite as much as a mortgagee of immovable property—*Mahamaya v. Haridas*, 42 Cal. 455 (477, 478), 19 C.W.N. 208, 27 I.C. 400.

Interest :—In a suit for foreclosure, interest may be allowed up to the date fixed by the Court for payment of the mortgage-money, at the rate stipulated in the mortgage-deed—*Rameswar v. Md. Mehdi Hossein*, 26 Cal. 39 (P.C.) ; *Surya Narain v. Jogendra*, 20 Cal. 360 ; *Chaturbhai v. Harbhamji*, 20 Bom. 744. This is now expressly provided in clause (a) (i) of Rule 11.

Prior to the amendment of the present Rule, there was no provision for interest after the date fixed in the preliminary decree for payment, as there is in Rule 4 which relates to a decree for sale. The reason was said to be, that in a suit for *foreclosure* the mortgagee obtained the property in lieu of his debt, and consequently interest stopped, but a *sale* was subject to substantial delay and in many cases was subject to long delays ; consequently such interest was allowed—*Maharaja of Bharatpur v. Rani Kannu Dei*, 23 All. 181 (183) (P.C.). But under the amended rule, *subsequent* interest has been allowed, vide clause (c) ; and the reason for this new provision has been stated in para (7) of the Report of the Special Committee cited above.

If the mortgage-bond contains no express provision for payment of any interest after the date fixed in the bond for payment of the mortgage-money, the Court should construe the terms of the deed and find out the intention of the parties. Where, on such consideration, it was clear that the intention of the parties was that interest was to be continued to be paid at the stipulated rate subsequent to the due date and up to actual payment, the Court decreed interest at the stipulated rate up to the date of the decree, and, at the Court rate of 6 per cent. subsequent to the date of decree up to the date of realisation—*Mathura v. Narindar*, 19 All. 39 (P.C.). Where on a construction of the deed it appeared that there was no contract to pay interest after the date fixed for repayment, it was held that the creditor was entitled to receive interest after the due date, not *as interest* but by way of *damages*. The rate of damages would *prima facie* be the rate of interest provided in the mortgage-bond, though there is no rule of law making that rate necessarily the measure of damages. If, however, the mortgage-rate was excessive, the Court would reduce the rate and direct that the damages should be paid at the reduced rate up to the date of suit, and after that date up to the date of payment, at the Court-rate of 6 per cent.—*Chajmal v. Brij Bhukhan*, 17 All. 511 (P.C.).

Extension of time :—See sub-rule (2), which substantially reproduces the proviso of the old rule 3 (2). It has been held by the Calcutta and Allahabad High Courts that before a final decree for foreclosure is passed, the mortgagor may pay the mortgage-money into Court without praying for an extension of time—*Somesh v. Ramkrishna*, 27 Cal. 705 ; *Salig Ram v. Muradan*, 25 All. 231. Until a final decree for foreclosure is passed, the mortgagor's right of redemption is not extinguished by the mere passing of the preliminary decree. Consequently, he can make payment at any time before the final decree, even though the 6 months' time fixed by the Court has expired—*Ysaf Ali v. Kasim Ali*, 26 C.W.N. 532. But the Madras and Patna High Courts are of opinion that the mere fact that a final decree for foreclosure has not been passed does not entitle the mortgagor as a matter of right to

redeem after the expiry of the period fixed by the Court, and is not a sufficient ground for extension of time—*Murugesu v. Ramaswami*, 39 Mad. 882 ; *Ratnakar v. Chamra*, 4 P.L.J. 347, 51 I.C. 881.

The application for extension of time should be made before a final decree for foreclosure is passed. Where, however, on the expiry of the time fixed for payment, the mortgagee applied for and obtained a final decree for foreclosure, but the mortgagor, not *having had notice* of that application, prayed for an extension of time, and within the extended time paid the amount due, *held* that the order granting extension of time was correct, in as much as the final decree had been made *without notice* to the mortgagor—*Narayana v. Papayya*, 22 Mad. 133.

The Court has a discretion to extend the time only on "good cause" shown ; and without any good cause shown the Court has no jurisdiction to grant an extension even for a very short period. The mere fact that mortgagors are accustomed to make delay in payments and that payment within the normal course is practically unknown, is not a good ground for extension of time—*Motilal v. Thakur Ujjar*, 55 Cal. 821 (P.C.), 32 C.W.N. 796, A.I.R. 1928 P.C. 137 (138), 109 I.C. 467.

Appeal from preliminary decree—Effect :—If the mortgagor prefers an appeal from the preliminary decree, but the Appellate Court simply dismisses the appeal, leaving the first Court's decree untouched, the fact of an appeal being preferred has not the effect of extending the time fixed for payment of money, so as to entitle the mortgagor to make payment within six months from the date of the *appellate decree*. The payment must be made within six months from the date of the preliminary decree of the first Court, and if it is not made within that date, the preliminary decree for foreclosure will be made absolute—*Bhola Nath v. Kanti Chandra*, 25 Cal. 311 ; *Basanta Kumar v. Radha Rani*, 26 C.W.N. 440, A.I.R. 1922 Cal. 329, 70 I.C. 735.

3. (1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,
and, if so required,

(b) ordering him to re-transfer the mortgaged property as directed in the said decree,

and, also, if necessary,

(c) ordering him to put the defendant in possession of the property.

3. (1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,
and, if necessary,—

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree.

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property;

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(2) Where payment *in accordance with sub-rule (1)* has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a *final* decree *declaring* that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of a *final* decree under sub-rule (2), *all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit* shall be deemed to have been discharged.

Amendment :—This rule has been amended by sec. 4 of the T. P. Amendment Supplementary Act (XXI of 1929) for the following reasons :

"We propose to amend this rule in accordance with the alterations made in rule 2. It is expressly stated that the decree made under this rule is final. For the reasons stated in paragraph (5) above, it is made clear in this rule that the payment by the mortgagor can be made at any time till the final decree for foreclosure is actually passed. It is also made clear that on payment of the amount declared or found to be due in the preliminary decree, together with the amount due for the subsequent costs and subsequent interest, the mortgagee can, on the application of the mortgagor, be ordered to re-convey or re-transfer the mortgaged property. The provision regarding the application by a mortgagor has been added to avoid difficulties which arise in such cases as I.L.R. 50 Bom. 730. Owing to the absence of words to that effect in the original rule 8, the Court found it difficult to hold what article of limitation applied to a final decree on payment by the mortgagor. In sub-rule (3) of the proposed rule it is provided that on foreclosure the liability of the defendant, not only in respect of the mortgage but for the costs of the suit also, is discharged and extinguished. The effect of a final decree for foreclosure is to vest the mortgaged property absolutely in the mortgagee and to extinguish not only the debt due on the mortgage but all liability arising in respect of the suit brought to enforce it. It is desirable that foreclosure, which is an exceptional remedy, should extinguish *in toto* the whole of the liability of the mortgagor."—*Report of the Special Committee.*

Redemption :—Until a decree for foreclosure absolute in proper form is made, the mortgagor can, upon a proper application, redeem the mortgage—*Somesh v. Ramkrishna*, 27 Cal. 705 ; and this he can do, even if the mortgagee has been put in possession—*Saligram v. Murudan*, 25 All. 231. The passing of the preliminary decree for foreclosure does not extinguish the right of redemption of the mortgagor. Consequently, it is open to him to redeem at any time before the passing of the

final decree, even though the six months' time allowed by the preliminary decree has expired—*Ysaf Ali v. Kasim Ali*, 26 C.W.N. 532. But see *Murugesu v. Ramaswami*, 39 Mad. 882; *Ratnakar v. Chamra*, 4 P.L.J. 347, 51 I.C. 881.

Notice :—In *Tarapada v. Kamini*, 29 Cal. 644, it was held, that no notice need be given to the judgment-debtor before obtaining an order absolute (final decree) for foreclosure under this rule; but in the Full Bench case of *Bibee Tulsiman v. Mahato*, 32 Cal. 253, it has been held that a Court has power to set aside such an order when made without notice to the mortgagor, on the ground that it was *ex parte*. An application for a final decree for foreclosure is an application in a suit, and not an application for execution of the preliminary decree, and notice ought to be issued to all the parties—*Bishambar v. Umed Ali*, 20 O.C. 268. The Allahabad High Court is of opinion that no such notice is necessary. Rules 2 and 3 are explicit, and no notice to the mortgagor between the preliminary decree and the final decree is therein prescribed—*Mahadeo v. Somnath*, 48 All. 828, A.I.R. 1926 All. 757 (758), 97 I.C. 277.

But if the defendant (mortgagor) is a minor, different considerations arise, and the Court has to see whether the minor's interests have been injuriously affected. Notice should therefore be issued to the minor. If such notice has been issued, any irregularity in giving the notice (e.g. giving the notice to a person other than the appointed guardian) would not be a ground for setting aside the final decree, if it is found that the minor's interests have not been affected by such irregularity—*Mahadeo v. Somnath*, *supra*.

If the *preliminary* decree has been passed *ex parte*, owing to the absence of the defendant, notice ought to be issued to the defendant before the final decree is passed—*Ramchandra v. Lalman*, 49 All. 396, 25 A.L.J. 296, A.I.R. 1927 All. 329, 100 I.C. 18.

Foreclosure in respect of several properties :—Where in a suit for foreclosure a decree has been made with respect to item (A) of the mortgaged property, but the suit has been dismissed with regard to the other item (B) and the mortgagee prefers an appeal against the portion of the decree dismissing the suit, it is not competent to the mortgagee to apply for an order absolute (final decree) with respect to the item (A) for which a preliminary decree for foreclosure has been obtained, without giving up his appeal. He is bound to wait till the disposal of the appeal. It is not open to him to obtain one final decree for foreclosure with respect to item (A) during the pendency of the appeal, and to obtain *another final decree* for foreclosure with respect to B after he succeeds in the appeal. There cannot be *two decrees* for foreclosure in respect of several properties comprised in one mortgage—*Sham Sundar v. Muhammad Ihtisham*, 27 All. 501 (F.B.), 2 A.L.J. 180.

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses (a), (b) and (c) of rule 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a *preliminary* decree to the effect mentioned in clauses (a), (b) and (c) (i) of *sub-rule (1)* of rule 2, and further directing that, in default of the defendant paying as therein mentioned, *the plaintiff shall be entitled to apply for a final decree* directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction

plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

therefrom of the expenses of the sale) be paid into Court and applied in payment of what *has been found or declared under or by the preliminary decree* due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, *charges, expenses* and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) *The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.*

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgagee is not a mortgagee by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

(3) In a suit for foreclosure *in the case of an anomalous mortgage*, if the plaintiff succeeds, the Court may, at the instance of *any party to the suit* or of any other person interested in mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) *Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require.*

Amendment :—This rule has been amended for the following reasons :—

"We propose to amend this rule, which relates to a preliminary decree for sale, on the lines of rule 2. As by the amendment in the Transfer of Property Act it is proposed to allow the remedy of foreclosure only in the case of a mortgage by conditional sale and an anomalous mortgage providing the remedy of foreclosure, the power of the Court to grant the alternative relief of sale can only be exercised in the case of such an anomalous mortgage. By the very nature of the mortgage by conditional sale the Court cannot order a sale of the property. We propose to amend clause (2) [now sub-rule (3)] by stating clearly that it applies only to an anomalous mortgage which provides for foreclosure. Sub-rule (4) is added to rule 4 on the same lines as rule 2 (3). It provides for a case where, besides the mortgagor, there are other parties in a suit for sale."—*Report of the Special Committee*.

"Sub-rule (2) has been inserted giving the Court power to extend the time for the payment of the amount due from a mortgagor after a preliminary decree for the sale of the mortgaged property has been passed. We think this is a power which the Court may well be trusted to exercise in proper cases and on proper terms. Abuse of such a provision is prevented by providing that the extension of time cannot be granted after the final decree for sale has been actually passed."—*Report of the Select Committee, (1929)*.

Suit for sale :—A suit for sale can be brought by the holder of every mortgage, except a mortgage by conditional sale and a usufructuary mortgage. See sec. 67 (a), Transfer of Property Act. Such a suit can also be brought where the property is subject to a *charge* under sec. 100 of that Act.

A sub-mortgagee is entitled to obtain an order for sale of the property mortgaged to him, *i.e.*, an order for sale of the mortgage-rights of his immediate mortgagor (the original mortgagee)—*Rani Shankar v. Ganesh*, 29 All. 385 (F.B.) (overruling *Ganga Prasad v. Chunni*, 18 All. 113); *Muthu v. Vencata Chellum*, 20 Mad. 35; *Zaki Hasan v. Deo Nath*, 10 C.L.J. 470, 4 I.C. 433.

A combined decree under this rule and rule 6 is in contravention of the law—*Chandicharan v. Ambika*, 31 Cal. 792; *Damodar v. Vyanku*, 31 Bom. 244.

Where a mortgage suit is compromised, and the compromise petition expressly states that the decree shall be considered as final and absolute, it is not necessary for the Court to pass a preliminary decree under Order 34, r. 4 before granting a final decree. It is always open to the parties to a litigation to waive a particular procedure, and to agree to a final decree being passed without a preliminary decree being passed in the first instance—*Ishan Chandra v. Nilratan*, 2 Pat. 538 (545).

Lis pendens :—If a preliminary decree is assigned, the assignee is affected by the doctrine of *lis pendens*—*Chunnilal v. Abdul*, 23 All. 331.

Interest :—In a suit for sale, interest may be allowed at the rate stipulated in the mortgage, up to the date fixed by the Court for payment of the mortgage-debt—*Subbaraya v. Ponnuswami*, 21 Mad. 364; *Rameswar v. Mehdi Hossein*, 26 Cal. 39 (P.C.); *Sundar Koer v. Rai Sham Kishen*, 34 Cal. 150 (P.C.); *Surya v. Jogendra*, 20 Cal. 360; *Chaturbhai v. Harbhamji*, 20 Bom. 744. This is now expressly laid down in the new Rule 11, clause (a). If the decree is varied on appeal, interest will be allowed at the stipulated rate up to the date fixed by the Appellate Court—*Jagannath v. Surajmal*, 54 Cal. 161 (P.C.), 31 C.W.N. 390. If the stipulated rate of interest appears to be of a penal character, *i.e.* unconscionable and extravagant, the Court is competent to grant relief—*Gopeswar v. Jadab Chandra*, 43 Cal. 632, 20 C.W.N. 689, 32 I.C. 537.

But after the date fixed by the Court up to the time of realisation, the Court may allow interest either at the rate stipulated in the mortgage—*Raja Balwant v. Amolak Ram*, 28 All. 223 (P.C.); *Bakar v. Udit*, 21 All. 361 (F.B.); *Maharaja of*

Bharatpur v. Rani Kanno Dei, 23 All. 181 (P.C.); *Rameswar v. Mahomed Mehdi Hossein*, 26 Cal. 39 (P.C.); *Gangaram v. Jaiballabh*, 30 Cal. 953; *Lachmi Narain v. Uman*, 29 All. 322; or it may allow interest at the Court rate (6 per cent.)—*Sundar v. Rai Sham Kishen*, 34 Cal. 150 (P.C.); *Jagannath v. Surajmal*, 54 Cal. 161 (P.C.); *Subbaraya v. Ponnusami*, 21 Mad. 364; *Saminathan v. Swamiappa*, 29 Mad. 170; *Venkatachalapathi v. Mavasar*, 42 Mad. 465; *Gokuldas v. Ghesiram*, 35 Cal. 221 (P.C.). The Court is not bound to allow interest at the rate stipulated in the mortgage, for the period beyond the date fixed by the Court, because after the expiration of the fixed date the matter passes from the domain of contract to that of judgment, and the rights of the mortgagee shall thenceforth depend not on the contents of the bond but on the directions in the decree. Interest should thenceforth be allowed at the Court rate—*Sundar v. Rai Sham Kishen*, supra. See clause (b) of the new Rule 11.

The plaintiff can recover interest for the period after the date fixed for payment, only when the interest is provided for in the final decree. If the preliminary decree awards interest at the bond-rate up to the time of realisation, but the final decree merely makes the preliminary decree absolute, without mentioning interest, held that the Court must be presumed to have refused interest, and the decree-holder therefore cannot claim any interest after the expiry of the period of grace—*Tekait Krishna Prasad v. Surendra Mohan*, 5 P.L.J. 598; *Udit v. Jasoda*, 27 C.L.J. 576.

Where the mortgagee, by his own act, put it out of the power of the mortgagor to make payment of the mortgage-money, no interest should be allowed for the period during which the mortgagor was thus prevented from paying the mortgage-money—*Gopeswar v. Jadab Chandra*, 43 Cal. 632, 20 C.W.N. 689, 32 I.C. 537.

If the preliminary decree refused to award *post litem* interest (interest after the date of institution of the suit), the Court has no power to allow such interest in the final decree—*Sourendra v. Hari Prasad*, 5 Pat. 135 (P.C.), 7 P.L.T. 97, 30 C.W.N. 482 (491), A.I.R. 1925 P.C. 280, 91 I.C. 1033.

A decree for sale awarding interest up to the date of realisation has been construed as allowing interest up to the date of confirmation of the sale—*Meghraj v. Narasingh*, 33 Cal. 846.

Extension of time :—See sub-rule (2) which is entirely new; for reason of this new clause see the Report of the Select Committee cited above. The ruling in *Taniram v. Gajanan*, 24 Bom. 300 is no longer good law.

Consent decree :—See notes under Rule 5 under heading “consent decree.”

Rights of second mortgagee :—C mortgaged a property X to A, and afterwards mortgaged the same property and a further property Y to B. A brought a suit for sale on his mortgage, against C, making B a party defendant, and obtained a decree. In that suit, B claimed to be entitled to a decree for sale of the properties X and Y. Held that in this suit B could only claim the surplus of the sale-proceeds of the property X after satisfaction of A's mortgage; but he could not treat the suit brought by A as one for his benefit and claim to be entitled to a decree for sale of the property Y. He must bring a separate suit on his mortgage—*Sarat Chandra v. Nahapiet*, 37 Cal. 907, 8 I.C. 1142.

5. (1) Where, on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

Final
decree in
suit for sale.

5. (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts

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decree in
suit for sale.

due from him' under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,

(b) ordering him to re-transfer the mortgaged property as directed in the said decree,

and, also, if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4.

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) *Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.*

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.

*Amendment :—*This rule has been amended by the T. P. (Amendment) Supplementary Act (XXI of 1929) for the following reasons :—

"Section 89 of the Transfer of Property Act, which was replaced by rule 5 of Order XXXIV, Civil Procedure Code, contained at the end the words 'and thereupon the defendant's right to redeem and the security shall both be extinguished.' These words gave rise to the view that an order absolute under the section had the

effect of extinguishing the rights arising out of the mortgage and substituting for them rights under the decree, and the mortgagor could not redeem after the order absolute was made (*Het Ram v. Shadi Ram*, 45 I.A. 130, 40 All. 407; *Matru Mal v. Durga Kunwar*, 47 I.A. 71, 42 All. 364). To avoid this result the words quoted above which occurred in section 89 were omitted in the corresponding rule 5 of Order XXXIV. No doubt is, therefore, left that the right of a mortgagor to redeem is not extinguished by the mere passing of a final decree (42 All. 517; see also *Sukhi v. Gulam Safdar*, 43 All. 469, 48 I.A. 465, at p. 472). We propose to lay it down definitely that the right of a mortgagor to redeem subsists till the confirmation of the sale held in execution of the decree passed against him under rule 4 or 7. We have, however, made a provision for compensating the purchaser when a mortgagor seeks to redeem after the sale has taken place but before it is confirmed."—*Report of the Special Committee*.

'If a decree has been passed, an order'.—These words have been used for the following reasons: "As the sub-rule stands at present, it contemplates the passing of another final decree in favour of a mortgagor who makes payment after a final decree for sale has been passed at the instance of the mortgagee but before the confirmation of sale of the mortgaged property. The passing of two final decrees would lead to confusion, besides obviously being an anomaly. In the case where a mortgagor gets a sale set aside before it is confirmed by making the required payment under O. XXI, r. 89, the directions given by the Court ordering the mortgagee to deliver the documents or to retransfer the mortgaged property are orders in execution and there is no necessity for the Court to pass another decree.—*Report of the Select Committee (1929)*.

Application:—The mortgagee is required to make an application under sub-rule (3) of this rule; and in that application he has only to pray that a final decree for sale has to be prepared. In case of the mortgagor paying up the decretal amount, it is not even necessary for the mortgagee to say to the Court that a final decree discharging the mortgage has to be passed in his favour—*Jodha Singh v. Gokaran*, 47 All. 546, A.I.R. 1925 All. 622, 87 I.C. 225.

If the mortgagor does not pay up the decretal amount within the period fixed by the preliminary decree, all that the mortgagee has to do is to make an application for a final decree under this rule: and nothing else remains to be done by him, and it is the Court's duty to pass the final decree. Consequently the mortgagee's application for final decree cannot be dismissed by reason of his subsequent absence on a date of hearing—*Jodha Singh v. Gokaran*, (supra); *Chandra Sekhar v. Amir Begam*, 49 All. 592, A.I.R. 1927 All. 439, 101 I.C. 676.

Notice:—See notes under heading *Notice*, under rule 3.

Notice to the judgment-debtor is not prescribed by law before making a decree final on the application of the decree-holder, but in practice it is given on the principle that it is just and proper to hear the opposite party. But where notice of the application for preliminary decree was duly served, and the mortgagor failed to appear to show cause on the day fixed for the hearing, it may reasonably be inferred that he had nothing to say and there was nothing for the Court to hear from him. A second notice of the application for final decree is not required in such circumstances, and the fact that the second notice was not duly served is not a ground for setting aside the *ex parte* final decree—*Babooji v. Ramgopal*, 19 N.L.R. 124, A.I.R. 1923 Nag. 320.

Payment out of Court:—Under sec. 89 of the Transfer of Property Act, the mortgagor could pay the money either into Court or to the plaintiff (out of Court). But the law has been changed after that section has been replaced by O. 34, r. 5. This rule contemplates that all payments made upon a preliminary decree should be made *into*

Court. If any payment is made *out of Court*, it must be *certified* under O. 21, r. 2; and if it is not so certified, the Court will consider that no payment has been made, and will pass a final decree under this Rule—*Piran Bibi v. Jitendra*, 21 C.W.N. 920, 25 C.L.J. 553; *Singa Raja v. Pethu Raja*, 42 Mad. 61 (63). The Allahabad High Court is of opinion that an application for final decree is not an application for *execution*; and therefore O. 21, r. 2, does not apply at all, so that the payment out of Court need not be certified—*Ramji Lal v. Singh Karan*, 39 All. 532, 40 I.C. 845.

But the case is otherwise if the amount of the decree is (wholly or partially) satisfied by an *arrangement* out of Court after the passing of the preliminary decree. There is nothing in this rule to justify the view that O. 23, rule 3 does not apply to adjustment of accounts made between the date of preliminary decree and the date of final settlement of accounts, and the Court should enquire into the adjustment *out of Court* pleaded by the mortgagor—*Jogendra v. Gouri*, 2 P.L.J. 533; *Piran Bibi v. Jitendra*, *supra*.

Where the preliminary decree under rule 4 is not prepared strictly in accordance with the provisions of rule 4, but is a *decree based on a compromise* arrived at between the parties, and the terms of the compromise are entered in the decree, the provisions of rule 5 would not apply to such decree; and in such a case, a payment out of Court if proved at a time when an application for making the decree absolute is pending, can be recognised, even though the payment has *not been certified*—*Sital Singh v. Baijnath*, 44 All. 668, A.I.R. 1922 All. 383, 20 A.L.J. 602; *Mangan v. Bhatoo*, 5 P.L.J. 672, 1 P.L.T. 416, 57 I.C. 473.

Court shall pass a decree etc.:—The final decree must be in consonance with the preliminary decree; the Court cannot go behind the preliminary decree—*Kalloo v. Naider*, 1929 A.L.J. 425, A.I.R. 1929 All. 252, 115 I.C. 462.

A decree for sale in enforcement of a mortgage or charge is not a decree for money—*Achalabala v. Surendra*, 24 Cal. 766; *Subbaraya v. Ponnusami*, 21 Mad. 364; *Giriya v. Sabhapati*, 29 Mad. 65; *Amolak v. Lachmi*, 19 All. 174.

The pendency of an appeal against a preliminary decree under rule 4 is a bar to the making of a final decree for sale under this rule. If a final decree is passed during the pendency of the appeal the decree is invalid and incapable of execution. Such a decree can be passed only after the dismissal of the appeal, when the preliminary decree has become conclusive between the parties—*Lalman v. Shiam Singh*, 24 A.L.J. 288, 92 I.C. 608, A.I.R. 1926 All. 291; *Gajadhar v. Kishen*, 39 All. 641. Contra—*Khairunnissa v. Oudh Commercial Bank*, 51 All. 640, A.I.R. 1929 All. 287, 119 I.C. 510; *Ramgolam v. Chowdhurybabu*, 10 C.W.N. 910. The Patna High Court is of opinion that a final decree passed during the pendency of the appeal from the preliminary decree is not absolutely invalid, but is valid and operative from the date of dismissal of the appeal—*Suman v. Deonandan*, 6 Pat. 780, A.I.R. 1927 Pat. 215, 103 I.C. 811.

The validity of an order directing a sale of the mortgaged premises cannot be questioned by the mortgagor on the ground that such a property is inalienable by law—*Madho v. Katwari*, 10 All. 130.

After a decree for sale of the mortgaged property is passed, and before the sale takes place, it is not competent for the Court, on the application of the mortgagee, to attach the income of the mortgaged property or to pass an order restraining the mortgagor from realising the income of the property, on the ground that the property when sold may not fetch a sufficient sum of money to satisfy the mortgage-debt—*Md. Inamullah v. Narain*, 37 All. 423, 13 A.L.J. 565, 29 I.C. 601.

Consent decree:—A preliminary decree under rule 4 must be followed by a final decree under rule 5; but a *consent decree* in a mortgage suit directing payment by instalments and providing that if any instalment was in default, the entire amount

would be realised by sale of the mortgaged property, is not covered by O. 34, rule 4, (because it does not provide for payment on a *fixed date within six months* from the date of declaring the amount due) and when such a decree is passed, it is not necessary to make a final decree under rule 5. In such a case the plaintiff will be at liberty to realise the money due to him by sale of the mortgaged property, on the default being made, without the necessity of any decree being passed under rule 5. In a consent decree, it is always open to the parties to waive a particular procedure, and to agree to a decree being passed, without conforming to the provision of rules 4 and 5—*Ishan Chandra v. Nilratan*, 2 Pat. 538 (545), 72 I.C. 1049, A.I.R. 1923 Pat. 375; *Askari v. Jahangiri*, 49 All. 297 (F.B.), 25 A.L.J. 107, A.I.R. 1927 All. 167 (168), 100 I.C. 59; *Ganganand v. Rameshwar*, 6 Pat. 388, 8 P.L.T. 730, A.I.R. 1927 Pat. 271 (277, 278), 102 I.C. 499; *Mangan Sahu v. Bhatoo*, 5 P.L.J. 672, 1 P.L.T. 416, 57 I.C. 473. In fact, such a consent decree is itself a final decree under rule 5, and no further decree under rule 5 is necessary—*Kora Lal v. Punjab National Bank*, 5 Lah. L.J. 67. It is open to the mortgagor to *waive a final decree* before execution can be levied. Where pending an appeal from a preliminary decree in a mortgage suit the parties compromised the suit, and a decree for a smaller amount payable in two years was passed, with a provision that the property was to be sold in default of payment, *held* that it was the intention of the parties that the mortgagee should realise the amount by sale of the property immediately on the expiry of the two years, without a final decree being passed—*Hemendra Lal v. Fakir Chand*, 50 Cal. 650, 27 C.W.N. 621, A.I.R. 1923 Cal. 626 (628), 74 I.C. 929. In a mortgage suit an instalment decree was passed on the basis of a *solenamah*. The decree as amended contained a direction that on the failure of the judgment-debtor to comply with the terms of the *solenamah*, the mortgaged properties should be sold; *held* that though the provisions of this rule were not strictly applicable, yet the decree was a valid decree and the Court had power to direct its enforcement by the sale of the properties—*Abir Paramanik v. Jahar Mahmud*, 34 Cal. 886.

If, however, the consent decree is in the form of a preliminary decree, and proceedings are not concluded by that decree, it would be necessary to obtain a final decree under rule 5—*Kashi Chandra v. Priyanath*, 28 C.W.N. 550, A.I.R. 1924 Cal. 645, 83 I.C. 424; *Jagannath v. Ram Karan*, 20 A.L.J. 575, A.I.R. 1922 All. 396, 68 I.C. 251.

Decree based on award:—An award of arbitrators stands on the same footing as a compromise; therefore when a decree in a mortgage suit is passed in terms of an award made on a reference to arbitration, the decree is not a decree passed under rule 4; consequently the decree-holder is entitled to execute the decree without applying for a final decree under rule 5—*Nripendranath v. Jhumak Mandar*, 3 Pat. 221, 4 P.L.T. 694.

Delivery of documents:—Where the preliminary and the final decree in a mortgage suit directed the defendants to deliver up to the plaintiffs all documents in their possession or power relating to the plaint property, but did not provide an alternative relief *viz.*, payment of *damages* in the event of non-delivery, *held* that the Court could not grant such alternative relief by way of execution—*M. Sivaraman v. Seshu Pattar*, 42 M.L.J. 356, A.I.R. 1922 Mad. 299.

Redemption:—The words “and thereupon the defendant’s right to redeem and the security shall both be extinguished” which occurred at the end of sec. 89 T. P. Act were omitted in this Rule in 1908; and the result was that notwithstanding the passing of a final decree in a mortgage suit, the mortgagor might redeem his property at any time before it was actually sold, because the mere passing of a final decree for sale did not extinguish the mortgagor’s right of redemption, which continued until a sale actually took place in pursuance of the decree—*Syed Shah v. Ismail*, 42 All. 517; *Sukhi v. Ghulam Safdar*, 43 All. 469 (P.C.) The ruling in *Het Ram v. Shadi*

Lal, 40 All. 407 (P.C.), 45 I.A. 130, decided under sec. 89, T. P. Act should no longer be taken as good law. The recent amendment made in this Rule by the Amendment Act of 1929 has given a further right to the mortgagor, in as much as this Rule further lays down that even though the property has been actually sold in pursuance of the final decree, the mortgagor is nevertheless entitled to redeem *before the sale is confirmed*; this is borne out by the words "at any time before the confirmation of the sale" newly added in clause (1). See the *Report of the Special Committee* cited above. But in such a case, the mortgagor must pay compensation to the purchaser by paying him 5 per cent. of the purchase-money; see the new sub-rule (2).

A subsequent mortgagee must, if he wishes to exercise the right of redemption left open to him, pay to the prior mortgagee who had purchased the mortgaged property the full amount due to him under his prior mortgage, and not merely the amount of purchase money; but where he has obtained possession upon his purchase, he is not entitled to any interest subsequent to the date of his possession—*Sri Ram v. Kesri*, 26 All. 185; *Delhi and London Bank v. Bhikari*, 24 All. 185.

Sale:—A Court has no jurisdiction to sell a property over which it has no territorial jurisdiction at the time it made the order of sale—*Premchand v. Mokhoda*, 17 Cal. 699; but where the property is only in part within the jurisdiction of another Court, the jurisdiction of the Court in which the suit was instituted to sell the whole property is not ousted—*Maseyk v. Steel and Co.*, 14 Cal. 661; *Gopy v. Doyboki*, 19 Cal. 13; *Tincowri v. Shib*, 21 Cal. 639.

Where after a decree for sale, an order was passed with the consent of the mortgagee that a certain parcel of land in the hands of one of the judgment-debtors should be sold last, *held*, that the order was binding upon the assignee of the decree and that a sale in contravention of the terms of the order was invalid and should be set aside—*Subbaraya v. Srinivasa*, 10 M.L.J. 211.

The decree-holder has a right to sell the mortgaged properties in whatever order he likes, and the Court executing a mortgage-decree ought not to fetter the discretion of the decree-holder to put up to sale whichever of the properties he wishes first to sell—*Jatadhari v. Buldeo*, 4 P.L.J. 207; *Khirodhar v. Gajadhar*, 6 P.L.T. 393, A.I.R. 1924 Pat. 484; and so, a purchaser of one of the mortgaged properties has no equity in his favour, and cannot be allowed to ask the Court that the property purchased by him should be sold last—*Khirodhar v. Gajadhar*, *supra*. But if the mortgage-deed specially provides that on default of payment of the mortgage-money the properties are to be sold in a particular order, it is not open to the decree-holder to change the order—*Jatadhari v. Buldeo*, 4 P.L.J. 207.

So also, the Court has undoubtedly the right to direct that the properties mortgaged should be sold in a particular order. Ordinarily, the right of selling the property in a particular order rests with the decree-holder, and in the absence of any contract between the parties the decree-holder may proceed to sell the properties in whatever order he thinks best so as to facilitate his realisation of the mortgage-debt. But the Court can, in the circumstances of a case and in view of the equities arising in favour of the various parties, direct the order in which the properties should be sold. Whereas the decree-holder has the right in the first instance to prescribe the order of the sale, the final power rests with the Court which has to adjust and determine the equities of the parties before it—*Rajkeshwar v. Md. Khalilul Rahman*, 3 Pat. 522 (533), 78 I.C. 796, A.I.R. 1924 Pat. 459; *Krishna v. Muthu Kumaraswami*, 29 Mad. 217.

If an order absolute for the sale of a portion only of the mortgaged property has been obtained, and the proceeds of the sale prove insufficient, a further order to sell another portion of the mortgaged property may be obtained—*Balkishanji v. Mithu*, 25 All. 212; also *Satnarain v. Radhakishan*, 25 All. 264.

Successive applications for sale of different portions of the mortgaged property may be made in execution of the same decree so long as the whole decree remains unsatisfied—*Balkishanji v. Mithu*, 25 All. 212.

The Court has power to ascertain what balance of the mortgage debt is really outstanding at the time of the application for the sale of the mortgaged property, and to order sale for the realisation of that amount only—*Hatem v. Abdul*, 8 C.W.N. 102.

Power to set aside sale or to stop sale:—O. 21, r. 89 C. P. Code applies to sales held under O. 34, r. 5 in execution of mortgage-decrees; and the mortgagor can apply to set aside the sale on depositing the requisite amount—*Virjiban v. Biseswar*, 48 Cal. 69, 60 I.C. 406, A.I.R. 1921 Cal. 169. Before sec. 89, T. P. Act was replaced by O. 34, r. 5, it was likewise held that the mortgagor whose property was sold in pursuance of an order absolute for sale under sec. 89 T. P. Act, could apply under sec. 310A C. P. Code 1882 (O. 21, r. 89) to set aside the sale on depositing the purchase-money etc.—*Raja Ram v. Chunni*, 19 All. 205; *Mallikarjunadu v. Lingamurti*, 25 Mad. 244 (F.B.); *Krishnaji v. Mahadev*, 25 Bom. 104. The Calcutta High Court held the contrary view in *Kedar Nath v. Kali Churn*, 25 Cal. 703, on the ground that the C. P. Code had no application to a sale held under the T. P. Act. This view can no longer stand after the procedural sections of the T. P. Act have been incorporated into the C. P. Code.

Similarly, the mortgagor is entitled to apply to adjourn or stop the sale under O. 21, r. 69 because the right to redeem is not extinguished by the mere passing of a final decree for sale, at any rate until the sale has been actually completed—*Bibijan v. Sachi Bewa*, 31 Cal. 863; *Misri Lal v. Mithu*, 28 All. 28; *Harjas v. Rameshar*, 20 All. 354; *Shyam Kishen v. Sundar*, 31 Cal. 373; *Bepin v. Jatindra*, 37 Cal. 897; *Adipuranam v. Gopalasami*, 31 Mad. 354.

Costs:—The costs awarded by a decree directing sale of the mortgaged property form part of the mortgage decree, and the decreeholder must proceed in the first instance against the property mortgaged. It is only in the event of the mortgaged property being found insufficient to satisfy the mortgage-decree that a decreeholder can proceed against the mortgagor personally (i.e. against his other properties) under rule 6 for recovery of the costs—*Rajkumar v. Sheonarain*, 35 Cal. 431, 12 C.W.N. 364; *Maqbul v. Lalta*, 20 All. 523; *Matukdhari v. Ramdas*, 2 P.L.J. 51, 38 I.C. 214; *Dambar v. Kalyan*, 40 All. 109, 15 A.L.J. 914, 43 I.C. 557; *Kamalamma v. Narasimha*, 30 Mad. 464.

6. Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount.

6. Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance.

This rule has been amended for the following reasons:—

“The words ‘any such sale’ in rule 6 and its position after rules 3 to 5 led to the view being taken that the personal decree for the balance of the amount due to a mortgagor after the sale can only be passed in a suit by a mortgagee for sale, and not in a redemption suit by a mortgagor, although in a redemption decree in default of payment by the mortgagor a sale of the mortgaged property can be ordered. In I.L.R. 42 Cal. 294, it is held that as this rule does not require an application by a mortgagee for the passing of a personal decree for the balance of the mortgage-money, no period

of limitation applies for claiming such relief. This view is not followed by other Courts (I.L.R. 40 All. 551). This point is made clear by introducing the words 'on application by the plaintiff' in rule 6 and the words 'on application by the defendant' in rule 8A."—*Report of the Special Committee.*

Proceeds of sale found insufficient—Personal decree:—An application for a personal decree under this rule can be maintained only when the whole of the mortgaged property has been sold and the proceeds have proved insufficient—*Lal Behari v. Habibar*, 26 Cal. 166; *Ramranjan v. Indranarain*, 33 Cal. 890; *Kommachi v. Pakker*, 20 Mad. 107; *Manawar v. Jani*, 27 All. 619; *Shiamsunder v. Ganesh*, 28 All. 674. Therefore a mortgagee who obtains a decree for sale but fails to execute it by bringing the mortgaged property to sale, is not entitled to apply under this rule—*Darbari v. Moola*, 42 All. 519. A mortgagee-decreeholder may obtain a money-decree under this rule where for some reason or other he has been unable to bring to sale the whole of the mortgaged property; but he cannot obtain a money decree under this rule where no portion of the mortgaged property has been sold either by private treaty or by Court auction—*Behari v. Bisheshar*, 9 A.L.J. 569, 14 I.C. 591. Thus, when the plaintiff could not sell any portion of the mortgaged property which was an occupancy holding and not saleable in execution of his decree, held that a personal decree against the mortgagor should not be given—*Parbhunarain v. Baldeo*, 29 All. 260. But if the whole of the property be not disposed of by public auction, but part thereof by public auction and part thereof by private sale with the consent of the judgment-debtor, this does not disentitle the decree-holder from obtaining a decree under this rule—*Udit v. Bacquar*, 2 A.L.J. 353.

If, in contravention of this rule, a personal decree is passed before the sale is held, but the mortgagor does not object, he is estopped from objecting to the personal decree at a later stage—*Teja v. Tika Ram*, 46 All. 35, A.I.R. 1924 All. 225.

The remedy of the mortgagee should in the first instance be against the property mortgaged and such property should be exhausted before a personal liability is imposed upon the mortgagor. But if a portion of the mortgaged property is destroyed or has ceased to be available for sale owing to the action of other claimants and not through the acts or default of the mortgagee, or owing to the mortgagor having no title to the property, the mortgagee can obtain a personal decree against the mortgagor—*Satish Ranjan Das v. Mercantile Bank*, 45 Cal. 702, 48 I.C. 322; *Ramranjan v. Indranarain*, 33 Cal. 890; *Chand Mall v. Ban Behari*, 50 Cal. 718 (723), 74 I.C. 1021, A.I.R. 1924 Cal. 209; *Sahu Bisheshar v. Chandu Lal*, 25 A.L.J. 1042, A.I.R. 1928 All. 71, 108 I.C. 459. Thus, where before the sale, a third person establishes his title to a moiety of the mortgaged property and the other moiety belonging to the mortgagor is only sold; held that the decree-holder can get a decree under this rule for the balance due, because the whole of what actually belonged to the mortgagor has been sold—*Kedar v. Chundar*, 29 All. 25.

Where a mortgage was executed by the father of a joint Hindu family, but it was found that it was not for any purpose binding on the sons, it was held that the mortgagee was entitled to a conditional personal decree under this rule against the father personally, and against the joint family property of himself and his undivided sons, for the recovery of the balance in case the sale-proceeds of the father's share was insufficient—*Kandasami v. Kuppu Moopan*, 43 Mad. 421 (422).

In order to make the remedy under this rule available, it is necessary that the mortgaged property should have been sold under rule 5 in execution of the decree of the person applying for the personal decree. If some of the property had been sold in execution of a decree on a prior mortgage held by a different person, a subsequent mortgagee who has obtained a decree for sale is not entitled to a personal decree under this rule—*Badri Das v. Inayet*, 22 All. 404. Similarly, where a person holding two mortgage-decrees in respect of two mortgages of the same property brought the

property to sale in execution of one of the decrees and purchased it himself, the sale-proceeds satisfying that decree completely and a part of the second decree also, *held* that he was not entitled to a decree under this rule in respect of the second decree, because he had not caused the property to be sold in execution of this second decree—*Kamta v. Saiyed Ahmad*, 31 All. 373, 6 A.L.J. 451, 1 I.C. 799.

The sale of property ordered to be sold under rule 5 constitutes the only condition precedent for a decree under this rule, whether the decree under rule 5 was passed rightly or wrongly—*Gaffur v. Muhammad*, 28 All. 19; hence the fact that the mortgagee has not had the whole mortgaged property included in the decree under rule 5 or that he has put up for sale a property to which it has been held that the mortgagor had no title, does not preclude the mortgagee from making an application under this rule—*Ibid*; *Sheo Persad v. Behari*, 25 All. 79; and if the mortgagee releases a portion of the mortgaged property from the debt, he can obtain a decree under this rule—*Pirbhu v. Amir*, 29 All. 369; *Gaffur v. Muhammad*, 28 All. 19. But the Calcutta High Court is of opinion that if the mortgagee releases a portion of the mortgaged property without the consent or acquiescence of the mortgagor, the latter may object on the ground that the mortgagee cannot without his consent increase his personal liability—*Ramranjan v. Indranarain*, 33 Cal. 890.

Where after the mortgaged property was sold, the sale was set aside, and the mortgagee was compelled to refund to the auction purchaser the amount of the purchase-money, *held* that the sale proceeds being reduced to nil were “insufficient to pay the amount” of the mortgage, and consequently the mortgagee was entitled to a personal decree under this rule—*Badal Singh v. Debi Saran*, 49 All. 506, 25 A.L.J. 485, A.I.R. 1927 All. 395.

The words “such sale” mean a sale of property directed to be sold by the decree under rule 4 and the final decree under rule 5; hence where the property mortgaged was *malikana* right in certain zemindari, but by mistake the decree directed the sale of the zemindari, which was sold: *held* that the provisions of this rule were complied with, and the decree-holder was entitled to a personal decree—*Shiam Sundar v. Ganesh*, 28 All. 674.

Amount due to plaintiff:—A puisne mortgagee obtained a decree for sale after redemption of prior incumbrances, which were redeemed by him; but the sum realized by the sale was not sufficient even to cover the amount due upon the prior incumbrances; *held* that the decree-holder was entitled to a decree in respect of the deficit due upon the prior incumbrances as well as in respect of the money due upon his own mortgage—*Alijan v. Mariam*, 26 All. 93.

A puisne mortgagee sued the prior mortgagees for redemption and a decree was passed for redemption or sale. The plaintiff did not pay the amount and the property was sold, but it failed to realise the amount of the debt due to the prior mortgagees; *held* that the decree, so far as it affected the puisne mortgagee, not being a personal decree, the prior mortgagees cannot get a decree under this rule against the puisne mortgagee to recover the balance—*Mati v. Sridhar*, 25 All. 507.

The expression “amount due to the plaintiff” of course includes costs—*Kamamma v. Narasimha*, 30 Mad. 464. But the mortgagor cannot be made personally liable for costs before the sale proceeds have proved insufficient to satisfy the mortgagee’s claim—*Ibid*; *Rajkumar v. Sheonarain*, 35 Cal. 431, 12 C.W.N. 364. See Notes under Rule 5, under heading “Costs.”

Balance legally recoverable from defendant:—If the mortgagor is under no personal liability, it is clear that no decree can be made under this rule. Every mortgage contains within itself a personal liability to repay the amount; that is, where there is in the mortgage nothing to the contrary, there is an implied promise to pay, presumed in law from the fact of the acceptance of the loan; but if the deed makes it

clear that the intention of the parties was that the remedy of the mortgagee should be restricted to the lands mortgaged, then of course there will be no personal liability of the mortgagor—*Parbati v. Govinda*, 4 C.L.J. 246; *Jangi v. Chunder*, 30 All. 388; but where there was no express or implied covenant that the mortgage-money should be realised from the mortgaged property alone, nor was there any distinct provision in the deed as to the precise remedy of the mortgagee, it was *held* that the remedy was not restricted to the mortgaged property only—*Bhugwan v. Parmeshwari*, 5 C.L.J. 287.

This rule applies where the balance is recoverable “from the *defendant*,” i.e. the mortgagor; if however the mortgagor has sold his equity of redemption, the balance is no longer legally recoverable from the mortgagor; nor is it legally recoverable from the *purchaser*, there being no contract between him and the mortgagee. Therefore no personal decree can be passed against the transferee at the instance of the mortgagee—*Jamna Das v. Ram Autar*, 34 All. 63 (P.C.); *Nanku Prasad v. Kampta Prasad*, 3 P.L.T. 637 (P.C.) 26 C.W.N. 771, A.I.R. 1923 P.C. 54.

Where the right to enforce the personal liability has been extinguished by the law of limitation, regard being had to the time of the institution of the suit upon the mortgage, and not to that of making an application under this rule, no decree can be made—*Malia v. Nachiappa*, 5 M.L.J. 294; *Musaheb v. Inayatullah*, 14 All. 513; *Hamiduddin v. Kedar*, 20 All. 386; *Sheikh Rahmat v. Sheikh Abdul*, 34 Cal. 672; *Jangi v. Chunder*, 30 All. 388; *Hanmant v. Raghavendra*, 24 Bom. L.R. 410, A.I.R. 1922 Bom. 237.

Court may pass a decree:—The mere fact that in a mortgage suit the personal remedy is asked for in the plaint only, and that nothing appears about it in the preliminary decree for sale is not sufficient to say that the plaintiff is ever afterwards barred from asking for it by reason of the principle of *res judicata*—*Govindasamy v. Kandasamy*, 53 M.L.J. 489, A.I.R. 1927 Mad. 779, 103 I.C. 528. So also, where a compromise was arrived at in a mortgage suit by the terms of which the amount due was made payable in instalments, and on default the entire amount was made payable by sale of the properties, and it appeared that by such sale the amount due was not fully discharged, *held* that a personal decree could be passed for the balance, although the terms of the compromise said nothing about a personal judgment—*Sundermull v. Galstaun*, 33 C.W.N. 300, A.I.R. 1929 Cal. 387.

The Court which can pass a decree under this rule is the Court which passed the decree under rule 4—*Bachu v. Gulab*, 27 Cal. 272; and the decree is to be made in the same suit, and it is not necessary for the mortgagee to bring a fresh suit for the amount—*Sanatun v. Ali*, 16 Cal. 423; *Tirhini v. Hurruk*, 21 Cal. 26; *Gopal v. Ali*, 10 All. 632; *Rajsingh v. Parmanund*, 11 All. 486. But this decree is only necessary in cases where the original decree is a mortgage decree and not where the original decree is against the mortgagor personally—*Dinanath v. Bejoy*, 7 C.W.N. 744; *Durga v. Bhagawant*, 13 All. 356; *Lalji v. Barbar*, 15 All. 334; and this decree can be passed only where the defendant by his contract or otherwise is personally liable for the debt—*Nanchand v. Yenawa*, 6 Bom.L.R. 585. This decree should be passed when the net proceeds are found to be insufficient; and a combined decree under r. 4 and this rule is in contravention of the law—*Damodar v. Vyanku*, 31 Bom. 244; *Chandicharan v. Ambika*, 31 Cal. 792.

Where the holder of a mortgage-decree, after selling the mortgaged property in execution of his decree, makes execution applications against the other properties of the judgment debtor for the realisation of unsatisfied balance, without proceeding under rule 6, and these applications are allowed and subsequently struck off, and the judgment-debtor raises no objection to the execution though served with notice, he is estopped by his conduct from objecting to a subsequent execution on the

ground that no decree under rule 6 has been obtained. The executing Court in this case being also the Court competent to make a decree under this rule, the order of the Court allowing execution against the other properties of the judgment-debtor is substantially a decree under this rule—*Madhu v. Kailash*, 2 C.W.N. 254.

Where upon an application for sale the decree-holder obtains leave to bid, upon the undertaking to pay the full decretal amount for the property, and the property is purchased *benami* for him at a less sum, and the judgment-debtor does not object at the time; *held*, upon the decree-holder applying for a personal decree under this rule for the balance, that the judgment-debtor having the remedy to get the sale set aside cannot object to the decree-holder executing his decree for the balance, although the purchase by him was an abuse of the process of the Court—*Durga v. Bhagwan*, 1 A.L.J. 486.

The proceedings following on an application under this rule are a continuation of the original suit; and the dismissal of such an application under section 102 C. P. Code 1882 (O. IX, rule 8 of the present Code) precludes the mortgagee from making a fresh application—*Ramdayal v. Mohammad*, 1 N.L.R. 143.

No formalities are required for an application for a personal decree under this rule, and the application need not be in writing. Even if a written application were necessary, the Court may allow it to be signed at any stage by the decree-holder—*Santi Lal v. Raj Narain*, 82 I.C. 65, A.I.R. 1924 All. 804.

7. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree in redemption suit.

(a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of the decree, and directing—

(c) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all docu-

7. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the defendant *at the date of such decree* for—

(i) principal and interest on the mortgage,
(ii) the costs of suit, if any, awarded to him, and
(iii) *other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or*

(b) declaring the amount so due at that date; and

(c) directing—

(i) that, if the plaintiff pays into Court the amount so *found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause*

ments in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold.

(a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an

anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure, or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

This rule has been amended in the same way as rule 2.

*Scope :—*This rule applies to all kinds of mortgages, whether a mortgage by conditional sale—*Narsingh v. Partap*, 50 All. 882, A.I.R. 1928 All. 480, 111 I.C. 242 ; or an anomalous mortgage—*Atma Ram v. Surjan*, 10 Lah.L.J. 198, 110 I.C. 81, A.I.R. 1928 Lah. 355. Therefore the provision as to extension of the time of payment applies to a mortgage by conditional sale—*Narsingh v. Partap*, supra.

*Enlargement of time :—*The provision for enlargement of time was formerly contained in the proviso to Rule 8 (4). It has now been transferred to sub-rule (2) of the present rule, with certain alterations. "In sub-rule (2) we have made it clear that the time for payment can only be extended before a final decree for foreclosure or sale is passed"—*Report of the Select Committee* (1929).

The default of the mortgagor in the payment of the amount of the redemption-decree within the period fixed therein cannot deprive him of his right of redemption on payment of the money after that period. It is competent for the Court, under this rule, to extend the time for such payment, on good cause shown—*Ishwar v. Gopal*, 28 Bom. 102. The time can be enlarged on good cause shown ; thus, it may be enlarged on the ground that the plaintiff failed to lodge the money in Court under a *bona fide* mistake—*Collinson v. Jeffery*, (1896) 1 Ch. 644 ; see *Sabapathy v. Murakhan*, 13 M.L.J. 266 ; *Kalian v. Sadho*, 35 All. 116. The fact that the mortgagees lose nothing by a late deposit of money by the mortgagor is a good cause for postponement of the date fixed for payment—*Jawahir v. Badal*, 13 O.L.J. 828, A.I.R. 1927 Oudh 586. If both parties are guilty of laches, the Court can exercise its discretion in extending time—*Chatur Bawa v. Popatlal*, 29 Bom.L.R. 228, A.I.R. 1927 Bom. 175. The Court must inquire into the sufficiency of the cause alleged, and when

the Court enlarges the time, it may impose such terms as it thinks fit—*Ishwar v. Gopal*, supra.

The rule as to enlargement of time applies not only where the suit is one for redemption but also where the suit is of a composite character, partaking of the nature of a suit for redemption and of a suit for sale. Where therefore a subsequent mortgagee brought a suit for sale impleading in the suit the prior mortgagee also, and the latter insisted upon his being redeemed by the plaintiff, and the decree directed the plaintiff to redeem the prior mortgage, *held* that the decree was both for sale and for redemption, (because as against the mortgagor, it was a decree for sale, and as against the prior mortgagee, it was a decree for redemption) and that in the event of non-payment by the plaintiff of the amount within the period fixed, the Court had power to extend the time—*Kalian v. Sadho Lal*, 35 All. 116, 18 I.C. 14. But if the prior mortgagee obtains a decree for sale on his prior mortgage, without impleading the second mortgagee, and sells the property in execution of his decree, and the second mortgagee then brings a suit upon his mortgage impleading the purchaser under the sale held under the prior decree, and the Court grants a decree for sale in this suit conditional on the second mortgagee's paying off the purchaser within a certain time, the Court cannot enlarge the time under this rule, because the condition that the second mortgagee should pay off the purchaser does not make the decree a decree for redemption of the prior mortgage, as that mortgage has merged in the decree which has been executed and satisfied—*Nandakunwar v. Sujan*, 43 All. 25, 18 A.L.J. 771, 57 I.C. 1006. This distinction however is no longer of any importance, for the Court can now enlarge the time for payment in a *suit for sale*. See the new sub-rule (2) of Rule 4.

The application for enlargement must be made in the Court in which the proceedings are pending. Thus, where a suit was dismissed by the Court of first instance, but on appeal the Appellate Court passed a preliminary decree for redemption after which the suit was remitted by the Appellate Court to the Court of first instance, *held* that the application for enlargement of time must be made to the Court of first instance and not to the Appellate Court—*Dharmaraja v. Srinivasa*, 39 Mad. 876; *Sheo Narain v. Chunni*, 23 All. 88; *Ram Dhani v. Lalit*, 31 All. 328. The power to enlarge time rests with the Court which is to pass the final decree, that is, the Court of first instance—*Beni Prosad v. Harnam*, 39 All. 396. But the Appellate Court has *also* jurisdiction to enlarge the time in a case in which there has been an appeal to itself—*Babu Prasad v. Khiali*, 3 A.L.J. 828.

It is not necessary, that the application for enlargement of the time fixed for redemption should be made within the period fixed by the preliminary decree. It may be made after the expiry of the period, provided it is made before a final decree (for foreclosure or sale) is passed—*Nandram v. Balaji*, 22 Bom. 771; *Bepin v. Mokunda*, 36 Cal. 122, 8 C.L.J. 547.

Where a preliminary decree is passed by the Court of first instance, directing the mortgagor to redeem within six months of the date of the decree, and an appeal is preferred against the preliminary decree, but the appellate Court merely dismisses the appeal and confirms the decree of the first Court, the mere fact of preferring the appeal has not the effect of extending the time so as to enable the mortgagor to redeem within six months from the date of the *appellate decree*—*Manavi Kraman v. Unniappan*, 15 Mad. 470, 2 M.L.J. 23; *Faijuddi v. Asimoddi*, 11 C.W.N. 679. See also *Chiranji v. Dharam Singh*, 18 All. 455. The same result follows if the appeal is withdrawn—*Patloji v. Ganu*, 15 Bom. 370; *Chudasama v. Ishwargar*, 16 Bom. 243. But the Court has a discretion to grant extension and can allow the mortgagor to make the deposit even three years after the passing of the appellate decree, if there had been no application by the mortgagee for a decree for sale. See *Moru v. Gangabai*, 50 Bom. 730, 98 I.C. 943, A.I.R. 1927 Bom. 32.

No appeal lies from an order extending the time for payment—*Dharmaraja v. Srinivasa*, 39 Mad. 876, 31 I.C. 240. But an order refusing to extend the time under this rule is appealable; see O. 43, rule 1 (o); but no second appeal is allowed from an order made in appeal—*Dattatraya v. Wasudeo*, 47 Bom. 956 (1958), 25 Bom. L.R. 990.

8. (1) Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

Final decree
in redemption-suit.

(a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,

(b) ordering him to retransfer the mortgaged property as directed in the said decree,

and, also, if necessary,

(c) ordering him to put the plaintiff in possession of the property.

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

8. (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

Final decree
in redemption-suit.

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to retransfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same:

Power to enlarge time. Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for payment.

into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

This rule has been amended in the same way as rule 5.

'Or, if such decree has been passed, an order':—"As in rule 5, we have made it clear that if the mortgagor makes payment after the passing of the final decree for sale, but before the confirmation of the sale itself, the Court need not frame another decree in his favour, but may by an order direct the mortgagor to redeliver the documents or re-transfer the mortgaged property"—*Report of the Select Committee (1929)*.

Final decree:—An application for a final decree under this rule may be made by the mortgagor as well as by the mortgagee—*Moru v. Gangabai*, 50 Bom. 730, A.I.R. 1927 Bom. 32.

Payment by mortgagor:—The mortgagor is not required by any rule of procedure to make an application and obtain an order thereon before he can pay the amount fixed by the decree for redemption of the mortgage. On the contrary the

duty is laid on the mortgagee, on failure of payment by the mortgagor, to make an application under clause (4) for the purpose of obtaining a decree directing the sale of the mortgaged property—*Baqar Khan v. Jagat Narain*, 28 O.C. 46, A.I.R. 1925 Oudh 255 (256).

The mortgagor is entitled to make the payment at any time *before a final decree for foreclosure or sale* is passed; he can tender the amount into Court even though more than twelve years have elapsed after the time fixed for payment—*Bhawani v. Ram Rati*, 28 O.C. 261, A.I.R. 1925 Oudh 649, 90 I.C. 418. Compare sub-rule (2) of Rule 7.

Second suit for redemption:—It is now settled law that when a suit for redemption has been instituted and a preliminary decree has been passed for redemption but has not been followed up by a final decree, and the mortgagee has taken no steps for foreclosure or sale, a subsequent suit for redemption of the same mortgage is maintainable—*Ramji v. Pandharinath*, 43 Bom. 334 (F.B.); *Sita Ram v. Madho Lal*, 24 All. 44 (F.B.); *Periandi v. Angappa*, 7 Mad. 423; *Ramasami v. Brahma Dutta*, 15 Mad. 366; *Shibbu Mal v. Paira Singh*, 1877 P.R. 86; *Nathu Singh v. Rura*, 1881 P.R. 14; *Himayat Ali v. Jwala Sarup*, 1905 P.R. 100; *Danpat Mal v. Jhagar*, 1908 P.R. 93 (F.B.); *Arura v. Bur Singh*, 5 Lah. 371, A.I.R. 1925 Lah. 31; *Radha Kishan v. Radha Kishan*, 7 Lah. 420. (Contra—*Vedapuratti v. Vallabha Valiya Raja*, 25 Mad. 300 (F.B.)). Where the preliminary decree for redemption was not drawn up in the manner prescribed by rule 7, and did not contain any clause that if payment was not made on or before the date fixed by the Court, the plaintiff should be debarred from all right to redeem or that the mortgaged property should be sold, and the plaintiff did not pay the money within the required time, but brought a second suit for redemption, *held* that the second suit for redemption was not barred—*Arura v. Bur Singh*, 5 Lah. 371 (373), 84 I.C. 67, A.I.R. 1925 Lah. 51. The plaintiffs brought a suit and obtained a decree for redemption conditional on their paying a certain sum within a time specified in the decree. The decree, however, instead of going to direct that in default of payment by the due date the property should be sold, directed that if payment was not made within the time fixed the judgment should be deemed to be non-existent. The plaintiffs did not pay the decretal amount within the time fixed, but some years afterwards brought a second suit for redemption. *Held* that the second suit was not barred either by reason of anything contained in the T. P. Act or section 13 (now 11) or sec. 244 (now 47) of the C. P. Code—*Sita Ram v. Madho Lal*, 24 All. 44.

Mortgagor entitled to immediate possession:—When either nothing is due, or any costs have been awarded to the mortgagor and the amount of such costs exceeds the mortgage-debt, the mortgagor will be entitled to obtain possession at once, and to recover the balance, if any, from the mortgagee—*Sidu v. Bali*, 17 Bom. 32.

Decree mentioning no time for payment:—Where a decree for redemption mentions no time for payment, it must be taken as operating from its date and no redemption will be permitted after the expiration of the period prescribed by Art. 181 of the Limitation Act, 1908—*Maruti v. Krishna*, 23 Bom. 592.

Sub-rule (3):—When a decree for redemption has been made by the appellate Court, an application for a decree under this sub-rule should be made not to the Court of appeal but to the Court of first instance—*Venkata v. Thyagaraya Chetti*, 23 Mad. 521; *Sheonarain v. Chunni*, 23 All. 88.

The omission of the Court to draw up the proper decree under rule 7 (e.g., if the preliminary decree for redemption does not contain a direction for foreclosure or sale in default of payment on the day fixed) does not deprive the mortgagee of the relief of foreclosure or sale as the case may be, provided by sub-rule (3)—*Murlidhar v. Parsharam*, 25 Bom. 101.

The expiry of six months fixed by the preliminary decree without payment of the decretal amount gives to the mortgagee a right to apply to the Court under sub-rule (3) of this rule for a decree that the mortgaged property be sold. But it does not take away the mortgagor's right to redeem, which subsists in his favour, even after sale, under O. 21, r. 89 of the C. P. Code—*Baqar Khan v. Jagat Narain*, 28 O.C. 46, A.I.R. 1925 Oudh 255 (256).

Right of mortgagor to apply for sale :—Although sub-rule (3) enables the mortgagee to apply for a decree for sale, still it does not prevent the mortgagor himself to apply for such a decree in a redemption suit when he has failed to pay the mortgage amount within the time fixed—*Govinda v. Veeran*, 36 Mad. 32.

8A. *Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance.*

This rule has been newly inserted. See the *Report of the Special Committee* under rule 6.

9. Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

This rule has been amended by the addition of the italicised words, for the following reasons :—

“Rule 10, as it stands, refers to the subsequent costs of the suit only. In finally adjusting the amount the Court has also to take into consideration other costs, charges and expenses which the mortgagee may have incurred since the date of the preliminary decree. The mortgagee must be entitled to the amount so spent (I.L.R. 44 Cal. 448). Rule 10 is, therefore, amended to empower the Court to take such sums into consideration. After the account is once taken or the amount declared in a preliminary decree, it is necessary that the power of the Court to take into account sums spent subsequently should be expressly recognised.”—*Report of the Special Committee.*

The costs awarded under this rule are to be realised from the mortgaged property, and not from the mortgagor personally—*Damber v. Kalyan*, 40 All. 409; *Matukdhari v. Ramdas*, 2 P.L.J. 51; *Sadiq Hussain v. Umatul*, 48 I.C. 329; *Ram Parkash v. Janki*, 12 O.L.J. 91, A.I.R. 1925 Oudh 351.

It is open to an appellate Court (in an appeal against a preliminary decree) to direct that such costs as it may award against the unsuccessful appellant may

be recovered from him personally, but if there is no such express direction, the costs are, as a matter of ordinary practice sanctioned by O. 34 rules 2, 4 and 10 of the C. P. Code, added to the mortgage-money and are, in the first instance, recoverable from the mortgaged property after the decree is made final—*Md. Istikharullah v. Banke Lal*, 45 All. 630 (631), 21 A.L.J. 617, 73 I.C. 950.

This rule has nothing to do with the costs awarded in execution proceedings. It relates to costs incurred by the mortgagee since the passing of the preliminary decree and before the final decree. The costs awarded in a successful appeal by the mortgagee from an order striking off execution proceedings are to be recovered from the mortgagor personally—*Het Ram v. Raja Dutt*, 48 All. 682, A.I.R. 1926 All. 722.

11. *In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the court may order payment of interest to the mortgagee as follows, namely:—*

Payment of interest.

(a) *interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other persons redeeming the mortgage—*

(i) *on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or where no such rate is fixed, at such rate as the Court deems reasonable,*

(ii) *on the amount of the costs of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of preliminary decree, and*

(iii) *on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money,—at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum; and*

(b) *subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—*

(i) *on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause; and*

(ii) *on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10.*

The old rule has been replaced by an entirely new one.

“We have proposed that the provisions of old rule 11 which lay down the principle of ‘redeem up and foreclosure down’ should be embodied in the new section 94 of the Transfer of Property Act. This rule should, therefore, be omitted. (See the *Special Committee Report* under sec. 94, T. P. Act).

“There being no specific rule as to interest, we propose that a new rule should be framed dealing exclusively with interest and this rule we propose to number as 11.

“Under section 2 of the Usury Laws Repeal Act (XXVIII of 1855), in any suit in which interest is recoverable the amount is to be adjusted or decreed by the Court at the rate (if any) agreed upon by the parties. Again, this provision is subject to the provisions of the Usurious Loans Act, 1918, and section 74 of the Indian Contract Act allowing the Court to reduce the rate if in its opinion it is penal or exorbitant. Under section 3 of Act XXVIII of 1855 it is at the discretion

of the Court to vary the rate agreed upon if it decides to allow further interest on the amount adjudged or decreed to be due. When no such rate has been fixed, the Court can award interest at the rate it deems reasonable. It was at one time thought that the Court was not competent to award interest after the date fixed for payment in a mortgage deed. It is, however, now well established that, even if there is no covenant for the payment of interest after the period fixed in the deed, interest can still be awarded by way of damages or under the Interest Act (XXXII of 1839); the rate allowed is generally the same as that stipulated in the deed (*Bindesri v. Ganga Saran*, 20 All. 171, 25 I.A. 9). As observed by the Privy Council, the scheme of the provisions in Order XXXIV of the Civil Procedure Code is that a general account should be taken once for all and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day and that, after the expiration of that day, if the property is not redeemed, the matter should pass from the domain of contract to that of judgment and the rights of the parties should thenceforth depend not on the contract or the bond, but on the directions in the decree. (*Sundar Koer v. Rai Sham Kishen*, 34 Cal. 150 P.C., 34 I.A. 9, at p. 21; *Jagannath v. Surajmal*, 54 Cal. 161 P.C., 54 I.A. 1). Up to the day fixed for payment in the preliminary decree in a mortgage suit, interest is generally allowed at the contract rate and thereafter up to the day of realization or actual payment it is entirely at the discretion of the Court to allow it at such rate as it deems reasonable (*Surya v. Jogendra*, 20 Cal. 360; *Subbaraya v. Ponnusami*, 21 Mad. 364; *Chaturbhai v. Harbhamji*, 20 Bom. 744; *Mathura v. Raja Narindar*, 19 All. 39 P.C., 23 I.A. 138). The result of the above decisions has been embodied in the new rule 11.

"The absence of any provision in Order XXXIV and corresponding old sections 85 to 99 of the Transfer of Property Act regarding post-diem interest has also led to a curious divergence of views. Some Courts held that the portion of the decree which awards such interest is to be treated as a decree for the payment of money and executed as such (*Narindar v. Khadim*, 17 All. 581; *Rikhi Ram v. Sheo Parshan*, 18 All. 316). This view, however, has not been adopted by other Courts which held that it must be treated as part of the mortgage-money and is to be recoverable out of the mortgaged property in the same way as the principal and the costs of the suit (*Bikramjit v. Durga Dayal*, 21 Cal. 274; *Rama Reddi v. Appaji*, 18 Mad. 248; *Achalabala v. Surendra*, 24 Cal. 766). This provision is intended to put an end to that divergence. It is proposed to provide that such interest is part of the mortgage-money."—*Report of the Special Committee*..

The words "principal amount found or declared due" in cl. (a) (i) mean only the principal amount on the mortgage without interest till date of suit. Hence a mortgagee is entitled to get from the date of suit to date fixed for payment interest at the contract rate only on the principal amount of the mortgage and not on the total amount due on the date of the suit. Under clause (b), the trial Court has a discretion in the matter of the allowance of future interest, and the Court may in its discretion allow future interest on the principal amount only and not on the whole amount due—*Chotey Lal v. Mohammad Ahmad*, 8 Luck. 315, A.I.R. 1933 Oudh 128 (129), 144 I.C. 983.

12. Where any property, the sale of which is directed under this Order, is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

The provisions of this rule apply to usufructuary mortgages—*Rangasami v. Subbaraya*, 30 Mad. 408.

Consent of the prior mortgagee :—If the prior mortgagee does not give his consent, he should not take away any part of the proceeds if he wishes to enforce his security against the purchaser—*Jhinka v. Baldeo*, 14 All. 509 ; if he takes it away, he is bound to apply the same towards the mortgage debt and not to other debts—*Ganga v. Jaiballav*, 30 Cal. 953.

Sale subject to mortgage :—A statement in a sale certificate that the purchase is subject to a mortgage, is not conclusive evidence against the purchaser, when it is sought to enforce the mortgage by suit—*Ram v. Hazi*, 16 Mad. 207 ; but it may be so where the existence of the mortgage has been either admitted by the parties or established by decree or declared under O. XXI r. 62.—*Shantappa v. Subrao*, 18 Bom. 175. And a person who sells a property in execution subject to a certain mortgage which has been allowed by the Court, cannot claim a re-sale on the ground that the alleged mortgage is null and void—*Parshotam v. Ganesh*, 23 Bom. 759.

When a mortgagee held several simple mortgages on properties A and B and also a usufructuary mortgage of prior date on property B, he is not entitled to bring to sale the property covered by his simple mortgages subject to the usufructuary mortgage, nor can he bring to sale the whole property for the aggregate amount of the mortgages simple and usufructuary—*Bhagwan v. Bhawani*, 26 All. 14 (17). But see *Rangaswami v. Subbaroya*, 30 Mad. 408.

Where in the decree for sale no provision was made in the interests of the first mortgagee, though his claim was admitted and he was joined as a defendant, it was *held* that with his consent the sale might be effected and the proceeds dealt with in accordance with this rule—*Srinivasa v. Yamunabai*, 29 Mad. 84.

13. (1) Such proceeds shall be brought into Court and applied as follows:—

Application of proceeds.

- first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;
- secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs properly incurred in connection therewith ;
- thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;
- fourthly, in payment of the principal money due on account of that mortgage ; and,
- lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

Person interested in the property sold :—This rule does not provide for unsecured creditors who cannot be said to be 'interested in the property sold' within the meaning of the last clause. But they are at liberty to enforce their claim against any surplus payable to the mortgagor—*Padmanabha v. Khemu*, 18 Bom. 684.

14. (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

Suit for sale necessary for bringing mortgaged property to sale.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

This was originally section 99 of the Transfer of Property Act.

The words "has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage" have been substituted for the words "in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property." "We approve of the proposal to repeal the provisions of sec. 99 of the Transfer of Property Act. We think that those provisions have worked considerable hardship and are not really needed. The first part of the section enacts that a mortgagee shall not bring the mortgaged property to sale otherwise than by instituting a suit under sec. 67 of the Act. In so far as it precludes the mortgagee from selling the mortgaged property under a judgment unconnected with the mortgage debt, it is in our opinion inexpedient; it is beyond doubt competent to a mortgagee to purchase the equity of redemption from the mortgagor by an agreement subsequent to and distinct from the mortgage transaction, and we can see no reason why it should not be equally competent to him to have it sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage (*Khairajmal v. Daim*, 32 Cal. 296; *Lisle v. Reeve*, 1902 A.C. 461). In so far as it precludes the mortgagee from selling the property under a judgment for the mortgage-debt it serves no useful purpose. We understand that the provision was enacted to prevent mortgagees from suing their mortgagors on the debt as such, and in execution selling the mortgagor's interest in the property. We however, think that no such provision was needed, seeing that under the law as it stood prior to the Act the Courts never allowed the sale of bare equity of redemption under a judgment on the covenant (*Syed Emam v. Raj Coomer*, 23 W.R. 187; *Khairajmal v. Daim*, 32 Cal. 296)"—*Statement of Objects and Reasons*. The effect of this alteration is to confine the operation of the present rule to cases where a mortgagee has obtained a personal decree against a mortgagor on a mortgage-debt. The object of this rule is to prevent the mortgagee from suing the mortgagor on a mortgage-debt as such, and in execution selling the equity of redemption, thereby depriving the mortgagor of the right of redemption that he is bound to get by the decree for sale—*Brajasundar v. Sarat Kumari*, 2 P.L.J. 55, 38 I.C. 791; *Official Receiver v. Nagarathnam*, 49 M.L.J. 643, A.I.R. 1926 Mad. 194.

The class of cases contemplated in this rule appears to be that class of cases in which a suit is brought upon a covenant to repay contained in a mortgage-deed or upon a debt arising out of that covenant or in respect of some other obligation arising out of the mortgage, and not a suit which is brought in order to enforce a sale of the mortgaged properties. It seems quite obvious that those may be very good reasons for refusing to allow the mortgaged properties to be sold merely because the mortgagee has obtained a decree against the mortgagor not in the form of a mortgage-decree but merely in the form of a personal decree against the mortgagor, a decree which does not in any way affect the mortgaged properties. In such a case it is clearly desirable that before the charge upon the mortgaged properties can be enforced, there should be a decree directing the enforcement of that charge—*Chaurasi v. Bhagan Sahu*, 2 Pat. 787 (791), A.I.R. 1924 Pat. 20, 74 I.C. 744.

The effect of this change is that a mortgagee will now be able to bring the mortgaged property to sale in execution of a decree for money in satisfaction of a claim *not* arising under the mortgage, without instituting a suit for sale in enforcement of the mortgage. See *Tarak Nath v. Bhubaneswar*, 42 Cal. 780.

The present rule is a rule of procedure, and not of substantive law. It has therefore a retrospective operation—*Bai Ganga v. Rajaram*, 35 Bom. 248.

Mortgagee :—This includes the holder of a usufructuary mortgage—*Aimullah v. Najimunnissa*, 16 All. 415; *Vigneswara v. Bapayya*, 16 Mad. 436; *Sheodeni v. Ramsaran*, 26 Cal. 164; and a person having a charge—*Aubhoyessury v. Gouri*, 22 Cal. 859; but not the assignee of a moneybond from the mortgagee—*Narhar v. Shivaram*, 7 Bom.L.R. 816; nor the assignee of a simple money decree obtained by a usufructuary mortgagee—*Banh Bal v. Mannilal*, 27 All. 450; (but see *contra*—*Jeevarathnam v. Srinivasa*, 17 M.L.J. 503 and *Sripal v. Gouri*, 11 O.C. 231); and where a security bond amounts to a mortgage, it is equally subject to the provisions of this rule—*Tokhan v. Girwar*, 32 Cal. 494; see *Girindra v. Bejoy*, 26 Cal. 246.

Even though the mortgagee disclaims all interest in his mortgage and asks for and obtains a simple money decree, he is precluded by this rule from bringing the mortgaged property to sale in execution of the money decree—*Kishan v. Umrao*, 1908 A.W.N. 49.

Sale in contravention of rule is voidable :—It was held in some cases that a sale in contravention of this rule was absolutely unlawful and void—*Sheodeni v. Ramsaran*, 26 Cal. 164; *Shib v. Kali*, 30 Cal. 463; *Kashi v. Jamuna*, 31 Cal. 922; *Basiruddi v. Kailash*, 33 Cal. 113; *Sonu v. Behari*, 33 Cal. 283. But in *Mayan v. Pakuran*, 22 Mad. 347, *Ashutosh v. Behari*, 35 Cal. 61 (F.B.), and *Muthu v. Karuppan*, 30 Mad. 313, it was held that such a sale was not void but voidable; and that notwithstanding the confirmation of such a sale the mortgagor might sue to redeem the mortgaged property. And this latter view has been confirmed by the Privy Council in *Khairajmal v. Daim*, 32 Cal. 296, where it has been held that a sale taking place in contravention of the principle enunciated in this rule cannot be treated as a nullity, as the irregularity is one of procedure only. See also *Muhammad v. Dilsukh*, 27 All. 517; *Basdeo v. Arjun*, 8 O.C. 327; *Lal Bahadur v. Abharan*, 37 All. 165 (F.B.); *Pachum v. Kishun*, 14 C.W.N. 579.

Since the sale of the mortgaged property in contravention of this rule is not void but voidable, the mortgagor cannot successfully maintain a suit for redemption of the mortgage without first getting the sale set aside—*Uttam v. Rajkrishna*, 47 Cal. 377 (F.B.).

Claim arising under the mortgage :—This rule is confined only to claims arising under the mortgage, and has no application where the sale takes place in execution of a decree for money upon a claim not arising under the mortgage—*Jagadish v. Bhubaneswar*, 27 C.W.N. 38, A.I.R. 1923 Cal. 121 (126).

This section does not apply where the claim in respect of which the mortgagee has obtained a decree is not a claim under the particular mortgage, but arises under another mortgage. Thus, where a mortgagee has two distinct mortgages, one on property X and another on property Y, he can, in execution of a money decree on a claim arising out of the mortgage on property X, bring the property Y to sale—*Bai Noorjan v. Hansraj*, 49 Bom. 208, 86 I.C. 870, A.I.R. 1925 Bom. 239.

A mortgagee who disclaims all interest under the mortgage, and obtains a simple money decree upon the personal covenant to pay, cannot sell the mortgaged property except by a suit for sale under section 67 of the Transfer of Property Act, because the relinquishment of the mortgage lien does not extinguish the mortgage altogether and the mortgagor cannot be deprived of his right of redemption—*Madho v. Baij Nath*, 2 A.L.J. 356. See also *Kishan v. Umrao*, 1908 A.W.N. 49. And also, where a suit for sale upon a mortgage is compromised and a simple money decree passed, the decretal amount being made a charge upon the property, it was held that the property could not be sold in execution of a decree, but the mortgagee should institute a second suit upon his decree under section 67 of the T. P. Act—*Hemban v. Behari*, 28 All. 58; *Gokul v. Puranmal*, 1 P.L.W. 69. If in a suit on a mortgage, the Court holds the mortgage to be unenforceable or time-barred and consequently

passes a simple money-decree, *held* that the mortgage being declared unenforceable, the decree is not a decree in a claim arising out of a *mortgage* and the plaintiff is entitled to bring the mortgaged property to sale without bringing a separate suit on the mortgage (which suit cannot be brought, the mortgage being inoperative)—*Suraj v. Jagbali*, 42 All. 566, 57 I.C. 14; *Chedi Lal v. Saadatunnissa*, 39 All. 36, 36 I.C. 907; *Ganesh Singh v. Debi Singh*, 32 All. 377. The mortgage must be a *subsisting* mortgage and not one which, by reason of the lapse of time or any other like circumstances has ceased to be enforceable by law—*Tansukh Rai v. Srigopal*, 43 All. 677, 19 A.L.J. 728, 63 I.C. 445.

A mortgages certain property to B, which was then in the possession of C, and agrees to deliver possession to B after recovering possession of it from C. A recovers possession from C but does not deliver the property to B. B sues A for possession and gets a decree for possession and for costs. *Held* that B is entitled to bring the mortgaged property to sale in execution of the decree for costs, for the claim in respect of costs is not a claim arising under the mortgage—*Haribans v. Srinivas*, 35 All. 518.

A suit to enforce a mortgage was compromised, the defendant undertaking to pay a certain sum by instalments. The compromise decree also stipulated that in the event of there being default in respect of three consecutive instalments the decree-holder would be entitled to realise the entire amount then remaining due from the other properties of the judgment debtors, and in the event of the amount not being so realised, the decree-holder would be entitled to realise the amount by sale of the mortgaged property. There having been default, the decree-holder applied for execution of the decree first by sale of the moveable properties, and secondly by sale of the mortgaged properties. But having failed to find any moveable properties of the judgment debtor the decree-holder applied for sale of the mortgaged properties. The judgment debtor contended that O. 34, rule 14 barred the sale of the mortgaged properties unless a separate suit was brought for that purpose. *Held* that the case did not fall under O. 34, r. 14. The decree obtained in the present case was something more than a decree for the *payment of money* in satisfaction of a claim arising under the mortgage. The decree itself ordered, in the event of default and in the event of the other properties of the judgment debtor proving insufficient, *a sale of the mortgaged property* itself, and it is not necessary, in the event which has happened, for the decree-holder to have to bring another suit asking again for the sale of the property merely because the other remedy given under the decree has proved infructuous—*Chaurasi v. Bhagan Sahu*, 2 Pat. 787 (790, 792), A.I.R. 1924 Pat. 20, 74 I.C. 144.

Mortgage must be independent of the decree:—The words “Where mortgagee” mean that the decree should relate to the payment of money in satisfaction of a claim arising under the mortgage, *i.e.*, mortgage independent of the decree. It can have no application where the mortgage or charge is created by the decree itself. Thus, where a money-decree (arising out of a money-claim) declared that the mortgagee had a first charge or lien on certain immoveable properties, *held* that the decree was not in respect of a claim arising under a mortgage or charge, but on the other hand the charge was created by the decree itself; and that therefore this rule did not apply, and that the plaintiff decree-holder was entitled to bring the property to sale without bringing a fresh suit on the charge created by the decree—*Ambalal v. Narayan*, 43 Bom. 631. Similarly, if a decree passed in a suit for maintenance makes the maintenance-money a charge upon the property, the decree-holder would be entitled to bring the properties to sale without bringing a separate suit on the charge—*Brojo Sundar v. Sarat Kumari*, 2 P.L.J. 55, 38 I.C. 791; *Indramani v. Surendra*, 35 C.L.J. 61, A.I.R. 1922 Cal. 35; *Hari Sankar v. Tapai*, 4 Pat. 693, A.I.R. 1926 Pat. 31; *Sabitri v. Mrs. Sari*, 12 Pat. 359, A.I.R. 1933 Pat. 306.

Bring the property to sale :—This rule forbids the *sale* of the property ; but it is no bar to an *attachment* of the property—*Kaji Inus v. Kaji Inus*, 8 Bom.L.R. 576 ; *Jeevarathanam v. Srinivasa*, 17 M.L.J. 503.

Succession Certificate :—Having regard to section 4 of the Succession Certificate Act, the Court cannot pass any decree under this rule in favour of the representative of the mortgagee where no certificate had been granted to him under any of the Acts mentioned in that section ; and a certificate which is granted after the passing of the decree under this rule is not sufficient to get rid of the difficulty in his path created by the clear language of that section—*Abdul Sattar v. Satya*, 35 Cal. 767.

15. All the provisions contained in this Order as to the Charges. sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.

15. All the provisions contained in this Order *which apply to a simple mortgage* shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of section 58, and to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.

This rule has been amended for the following reasons :—"Section 96 (new) of the Transfer of Property Act applies the provisions relating to simple mortgages to mortgages by deposit of title-deeds. Our amendment to this rule makes the necessary corresponding provision in this Order"—*Report of the Select Committee* (1929).

APPENDIX III.

NEW FORMS OF DECREES UNDER O. 34, C. P. CODE.

By sec. 8 of the T. P. Amendment Supplementary Act (XXI of 1929) the following forms have been substituted for the old forms 3 to 11 in Appendix D of the C. P. Code, 1908. The *Special Committee* observes:—

“We propose to substitute new Forms for Forms 3 to 11 for decrees in mortgage suits appearing in Appendix D to the Code of Civil Procedure. Under O. XLVIII, rule 1, of the Civil Procedure Code, the Court has to follow the Forms with such variations as the circumstances of the case require. The present Form No. 3 in Appendix D does not correspond to rule 2 of Order XXXIV under which it purports to have been made. It does not provide for directions for taking accounts but merely refers to the declaration of the amount due by the Court. Separate Forms Nos. 3 and 3A are, therefore, framed for preliminary decrees for foreclosure in which accounts are directed to be taken and in which the amount due is declared by the Court. The Forms follow the amendments made in rules 2 and 3. So also Form No. 4 for a final decree for foreclosure is substituted for Form No. 10. It has been framed to conform to Forms Nos. 3 and 3A. Similarly Forms Nos. 5, 5A, 7 to 7C are framed for preliminary decrees for sale and redemption. They follow the amended rules 4 to 7.

Forms Nos. 7D to 7F have been added to provide for a final decree in a suit for foreclosure, sale or redemption, when the mortgagor pays the amount of the decree.

“Form No. 8 is for a final decree under rules 6 and 8A and is substituted for the original Form No. 11. It is amended in accordance with the amendments made in rules 6 and 8A.

“Form No. 9 takes the place of the present Form No. 6. It provides for a case where, in a suit for foreclosure or sale, besides the mortgagor a subsequent mortgagee is joined as a defendant. The form sets out in detail the respective and relative rights of all parties as required in rules 2 (3) and 4 (3). The practice of allowing successive periods of redemption when there are several mortgages is falling into disuse even in England and the usual course now is to give only one period of redemption more particularly when the mortgaged property is likely to deteriorate (Ghose on Mortgage, Vol. I, p. 639, 5th Edn.). The present Form No. 6 allows six months for redemption to a subsequent mortgagee and then three months further to the mortgagor. There is no reason why a period longer than the ordinary period of 6 months should be allowed for redemption and the mortgagee be made to wait for his money, merely because the mortgagor has chosen to create further incumbrances. In Form No. 9 only one period of redemption is allowed to all defendants.

“Forms Nos. 10 and 11 take the place of the existing Forms Nos. 7 and 8 and have been framed in accordance with the amendments in rules 3 to 8. In Form No. 11 the principle of one period of redemption is strictly adhered to.”—
Report of the Special Committee.

FORM No. 3.

Preliminary decree for foreclosure.

(Order XXXIV, rule 2.—Where accounts are directed to be taken).

(TITLE.)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following :—

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;
- (iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property, or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

- (i) that the defendant do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due, and the sum of Rs. for the costs of the suit awarded to the plaintiff;
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court

all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit, and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such direction as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 3A.

Preliminary decree for foreclosure.

(Order XXXIV, r. 2—Where the Court declares the amount due).

(TITLE.)

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs. for the costs of this suit awarded to the plaintiff, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows :—

- (i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, the said sum of Rs.
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such direction as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 4.

Final decree for foreclosure.

(Order XXXIV, rule 3.)

(TITLE.)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of and the application of the plaintiff dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage:

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned; **[and (if the defendant be in possession of the said mortgaged property) that the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgaged property.]*

2. And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

FORM No. 5.

Preliminary decree for sale.

(Order XXXIV, rule 4.—Where accounts are directed to be taken.)

(TITLE.)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;

* Words not required to be deleted.

- (iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal or, failing both such rates, at nine per cent. per annum);
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (iii), together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed :—

- (i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the plaintiff ;
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property ; and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold ; and for the purposes of such sale the plaintiff shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction there-

from of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 5A.

Preliminary decree for sale.

(Order XXXIV, rule 4.—When the Court declares the amount due.)

(TITLE.)

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage-security, together with interest thereon, and the sum of Rs. for the costs of the suit awarded to the plaintiff, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows :—

- (i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, the said sum of Rs. ;
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims, and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 6.

Final decree for sale.

(Order XXXIV, rule 5.)

(TITLE.)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of and the application of the plaintiff dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges, and expenses as may be payable

under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

FORM No. 7.

Preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed.

(Order XXXIV, rule 7.—Where accounts are directed to be taken.)

(TITLE.)

This suit coming on this day etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following :—

- (i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);
- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;
- (iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties, or failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum);
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. It is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

- (i) that the plaintiff do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the defendant;

- (ii) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at liberty to apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 7A.

Preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed.

(Order XXXIV, rule 7.—Where accounts are directed to be taken.)

(TITLE.)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

- (i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);
- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;
- (iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is

destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money, or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that, upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the defendant :

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person, as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property ; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold ; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 7B.

Preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed.

(Order XXIV, rule 7.—Where the Court declares the amount due.)

(TITLE.)

This suit coming on this day, etc.; It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. for the costs of the suit awarded to the defendant, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows :—

- (i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court the said sum of Rs.
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court

from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 7C.

Preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed.

(Order XXXIV, rule 7.—Where the Court declares the amount due.)

(TITLE.)

This suit coming on this day, etc.; It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. for the costs of this suit awarded to the defendant, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows :—

- (i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, the said sum of Rs. ;
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property to the plaintiff free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims, and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may

be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 7D.

Final decree for foreclosure in a redemption suit on default of payment by mortgagor.

(Order XXXIV, rule 8.)

(TITLE.)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of , and the application of the defendant dated the day of for a final decree and after hearing the parties, and it appearing that the payment as directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the plaintiff and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned *[and (if the plaintiff be in possession of the said mortgaged property) that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said mortgaged property.]

2. And it is hereby further declared that the whole of the liability whatsoever of the plaintiff up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

FORM No. 7E.

Final decree for sale in a redemption suit on default of payment by mortgagor.

(Order XXXIV, rule 8.)

(TITLE.)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of , and the application of the defendant dated the day of , for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the mortgaged property in the aforesaid

* Words not required to be deleted.

preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant for such costs of this suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

FORM No. 7F.

Final decree in a suit for foreclosure, sale or redemption where the mortgagor pays the amount of the decree.

(Order XXXIV, rules 3, 5 and 8.)

(TITLE.)

This suit coming on this day for further consideration and it appearing that on the day of the mortgagor or , the same being a person entitled to redeem, has paid into Court all amounts due to the mortgagee under the preliminary decree dated the day of ; It is hereby ordered and decreed that :—

- (i) the mortgagee do execute a deed of re-conveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor * [or, as the case may be, who has redeemed the property] or an acknowledgment of the payment of the amount due in his favour ;
- (ii) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit.

And it is hereby further ordered and decreed that, upon the mortgagee executing the deed of re-conveyance or acknowledgment in the manner aforesaid,—

- (i) the said sum of Rs. be paid out of Court to the mortgagee;
- (ii) the said deeds and documents brought into the Court be delivered out of Court to the mortgagor * [or the person making the payment] and the mortgagee do, when so required, concur in registering, at the cost of the mortgagor * [or other person making the payment], the said deed of re-conveyance or the acknowledgment in the office of the Sub-Registrar of ; and
- (iii) * [if the mortgagee, plaintiff or defendant, as the case may be, is in possession of the mortgaged property] that the mortgagee do forthwith deliver possession of the mortgaged property in the aforesaid preliminary decree mentioned to the mortgagor * [or such person as aforesaid who has made the payment].

FORM No. 8.

Decree against mortgagor personally for balance after the sale of the mortgaged property.

(Order XXXIV, rules 6 and 8A.)

(TITLE.)

Upon reading the application of the mortgagee (the plaintiff or defendant as the case may be) and reading the final decree passed in the suit on the day of _____ and the Court being satisfied that the net proceeds of the sale held under the aforesaid final decree amounted to Rs. _____ and have been paid to the applicant out of the Court on the _____ day of _____ and that the balance now due to him under the aforesaid decree is Rs. _____ ;

And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor (plaintiff or defendant, as the case may be) personally ;

It is hereby ordered and decreed as follows :—

That the mortgagor (plaintiff or defendant, as the case may be) do pay to the mortgagee (defendant or plaintiff, as the case may be) the said sum of Rs. _____ with further interest at the rate of six per cent. per annum from the _____ day of _____ (the date of payment out of the Court referred to above) up to the date of realization of the said sum, and the costs of this application.

FORM No. 9.

Preliminary decree for foreclosure or sale.

[Plaintiff.....1st Mortgagee,

vs.

Defendant No. 1.....Mortgagor.

Defendant No. 2.....2nd Mortgagee.]

(Order XXXIV, rules 2 and 4.)

(TITLE.)

This suit coming on this _____ day, etc.; It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of _____ is the sum of Rs. _____ for principal, the sum of Rs. _____ for interest on the said principal, the sum of Rs. _____ for costs, charges and expenses (other than the costs of the suit) incurred by the plaintiff in respect of the mortgage-security with interest thereon and the sum of Rs. _____ for the costs of this suit awarded to the plaintiff, making in all the sum of Rs. _____.

(Similar declarations to be introduced with regard to the amount due to defendant No. 2 in respect of his mortgage if the mortgage-money due thereunder has become payable at the date of the suit.)

2. It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No. 2 * [or (if there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively :—]

3. And it is hereby ordered and decreed as follows :—

(i) (a) that defendants or one of them do pay into Court on or before the _____ day of _____ or any later date up to which time for payment has been extended by the Court the said sum of Rs. _____ due to the plaintiff ; and

* Words not required to be deleted.

- (b) that defendant No. 1 do pay into Court on or before the
 day of or any later date up to which time for payment
 has been extended by the Court the said sum of Rs. due to
 defendant No. 2 ; and
- (ii) that, on payment of the sum declared to be due to the plaintiff by
 defendants or either of them in the manner prescribed in clause (i) (a)
 and on payment thereafter before such date as the Court may fix of
 such amount as the Court may adjudge due in respect of such costs of
 the suit and such costs, charges and expenses as may be payable under
 rule 10, together with such subsequent interest as may be payable under
 rule 11, of Order XXXIV of the First Schedule to the Code of Civil
 Procedure, 1908, the plaintiff shall bring into Court all documents in
 his possession or power relating to the mortgaged property in the plaint
 mentioned, and all such documents shall be delivered over to the
 defendant No. (who has made the payment), or to such person
 as he appoints, and the plaintiff shall, if so required, re-convey or re-
 transfer the said property free from the said mortgage and clear of and
 from all incumbrances created by the plaintiff or any person claiming
 under him or any person under whom he claims, and also free from
 all liability whatsoever arising from the mortgage or this suit and shall,
 if so required, deliver up to the defendant No. (who has made
 the payment) quiet and peaceable possession of the said property.

*(Similar declarations to be introduced, if defendant No. 1 pays the amount found
 or declared to be due to defendant No. 2, with such variations as may be necessary
 having regard to the nature of his mortgage.)*

4. And it is hereby further ordered and decreed that, in default of payment
 as aforesaid of the amount due to the plaintiff, the plaintiff shall be at liberty to
 apply to the Court for a final decree—

- (i) **[in the case of a mortgage by conditional sale or an anomalous mort-
 gage where the only remedy provided for in the mortgage-deed is fore-
 closure and not sale]* that the defendants jointly and severally shall
 thenceforth stand absolutely debarred and foreclosed of an from all
 right to redeem the mortgaged property described in the Schedule
 annexed hereto and shall, if so required, deliver to the plaintiff quiet
 and peaceable possession of the said property; or
- (ii) **[in the case of any other mortgage]* that the mortgaged property or a
 sufficient part thereof shall be sold; and that for the purposes of such
 sale the plaintiff shall produce before the Court or such officer as it
 appoints, all documents in his possession or power relating to the mort-
 gaged property; and
- (iii) **[in the case where a sale is ordered under clause 4 (ii) above]* that
 the money realised by such sale shall be paid into Court and be duly
 applied (after deduction therefrom of the expenses of the sale) in pay-
 ment of the amount payable to the plaintiff under this decree and under
 any further orders that may have been passed in this suit and in pay-
 ment of the amount which the Court may adjudge due to the plaintiff
 in respect of such costs of this suit and such costs, charges and expenses
 as may be payable under rule 10, together with such subsequent interest
 as may be payable under rule 11, of Order XXXIV of the first Schedule
 to the Code of Civil Procedure, 1908, and that the balance, if any, shall

be applied in payment of the amount due to defendant No. 2; and that if any balance be left, it shall be paid to the defendant No. 1 or other persons entitled to receive the same; and

- (iv) that, if the money realised by such sale shall be sufficient for payment in full of the amounts due to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed—

- (a) that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in the payment of the said amount, defendant No. 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree (*in the same manner as the plaintiff might have done under clause 4 above*)—

*[(i) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to defendant No. 2 quiet and peaceable possession of the said property;] or

*[(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property]; and

- (b) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed **[in the case where a sale is ordered under clause 5 above]*—

- (i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by defendant No. 2 in respect of the plaintiff's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to defendant No. 2 in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of this suit and such costs, charges and expenses as may be payable to defendant No. 2 under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same; and

- (ii) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of the plaintiff's mortgage

* Words not required to be deleted.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

Description of the mortgaged property.

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(ii) that, on payment of the sum declared due to defendant No. 2 by the plaintiff and defendant No. 1 or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect

* Words not required to be deleted.

of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, defendant No. 2 shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or defendant No. 1 (whoever has made the payment), or to such person as he appoints, and defendant No. 2 shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff or defendant No. 1 (whoever has made the payment) quiet and peaceable possession of the said property.

(Similar declarations to be introduced if defendant No. 1 pays the amount found or declared due to the plaintiff, with such variations as may be necessary having regard to the nature of his mortgage.)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid, of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree—

- (i) **[in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale]* that the plaintiff and defendant No. 1 jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the defendant No. 2 quiet and peaceable possession of the said property; or
- (ii) **[in the case of any other mortgage]* that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and
- (iii) **[in the case where a sale is ordered under clause 4 (ii) above]* that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to defendant No. 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to defendant No. 2 in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908; and that the balance, if any, shall be applied in payment of the amount due to the plaintiff and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same; and
- (iv) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to defendant No. 2 and the plaintiff, defendant No. 2 or the plaintiff or both of them, as the case may be,

* Words not required to be deleted.

shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed—

(a) that, if the plaintiff pays into Court to the credit of this suit the amount adjudged due to defendant No. 2, but defendant No. 1 makes default in the payment of the said amount, the plaintiff shall be at liberty to apply to the Court to keep defendant No. 2's mortgage alive for his benefit and to apply for a final decree (*in the same manner as the defendant No. 2 might have done under clause 4 above*)—

*[(i) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property;] or

*[(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property;]

and (b) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed (*in the case where a sale is ordered under clause 5 above*)—

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by the plaintiff in respect of defendant No. 2's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(ii) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No. 2's mortgage or the plaintiff's mortgage, defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

SCHEDULE.

FORM No. 11.

U.S.

(TITLE.)

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(iii) that, upon payment into the Court by defendant No 1 of the amount due to defendant No. 2 the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs, charges and expenses, as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall then be paid to defendant No. 2; and that if the amount paid into the Court be not sufficient to pay in full the sum due to the plaintiff, the plaintiff shall be at liberty (if such remedy is open to him by the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 for the amount of the balance.

3. And it is further ordered and decreed that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, the plaintiff shall bring into the Court all documents, etc. [as in sub-clause (ii) of clause 2].

4. And it is hereby further ordered and decreed that, in default of payment by defendants Nos. 1 and 2 as aforesaid, the plaintiff may apply to the Court for a final decree for sale, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and that for the purposes of such sale the plaintiff and defendant N. 2 shall produce before the Court or such officer as it appoints, all documents in their possession or power relating to the mortgaged property.

5. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with such costs of the suit and other costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same.

6. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 or defendant No. 1 (as the case may be) for the amount of the balance.

7. And it is hereby further ordered and decreed that, if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in payment of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be).

(Declarations in the ordinary form to be introduced according to the nature of defendant No. 2's mortgage and the remedies open to him thereunder).

8. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

APPENDIX IV.
THE CROWN GRANTS ACT.
Act No. XV of 1895.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.
Received the Governor-General's Assent on the 10th October, 1895.

An Act to explain the Transfer of Property Act, 1882, so far as relates to grants from the Crown, and to remove certain doubts as to the power of the Crown in relation to such grants.

WHEREAS doubts have arisen as to the extent and operation of the Transfer of Property Act, 1882, and as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, and it is expedient to remove such doubts; It is hereby enacted as follows:—

Title, extent and commencement.

1. (1) This Act may be called the Crown Grants Act, 1895;

(2) it extends to the whole of British India.

Transfer of Property Act, 1882, not to apply to Crown grants.

2. Nothing in the Transfer of Property Act, 1882, contained shall apply, or be deemed ever to have applied, to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of Her Majesty the Queen-Empress, her heirs, or successors, or by or on behalf of the Secretary of State for India in Council, to, or in favour of, any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

This section does not render all the provisions of the Transfer of Property Act inapplicable to lands held under grant from the Crown, but the meaning of this section is that when the Court is called upon to construe an instrument granting land by the Crown, it shall construe such grant irrespective of the provisions of the Transfer of Property Act—*Dost Muhammad v. Bank of Upper India*, 3 A.L.J. 129.

An unconditional grant made by the Crown free from restrictions as to alienation can be the subject of attachment and sale in execution of a decree obtained against the grantee of the land by his mortgagee—*Dost Muhammad v. Upper India Bank*, 3 A.L.J. 628.

This Act exempts the grant from the operation of the Transfer of Property Act, but not from the operation of the *Registration Act*. Whether a lease granted by the Crown requires registration or not is to be decided with reference to sec. 90 of the *Registration Act*—*Secretary of State v. Nistarini*, 6 Pat. 446, A.I.R. 1927 Pat. 319; *Munshi Lal v. Notified Area*, 36 All. 176. The Transfer of Property Act does not apply to Crown grants, but according to Statute 22 and 23 Vic. C. 41, a deed duly executed by the Collector is necessary in case of grant of land even of value less

than Rs. 100; mere delivery of possession is not sufficient—*Rupan Singh v. Akhaj*, 10 Pat. 203, 131 I.C. 811, A.I.R. 1931 Pat. 268 (270).

3. All provisions, restrictions, conditions, and limitations over contained in any such grant or transfer aforesaid shall be valid, and take effect according to their tenor, any rule of law, Statute, or enactment of the Legislature to the contrary notwithstanding.

Crown grants to take effect according to their tenor.

Thus, where the Crown made a grant of a village for the maintenance of a tomb, *held* that the validity of the grant could not be questioned on the ground that it created an estate not recognised by the Mahomedan Law—*Haji Mahomed Nasuruddin v. Egambara Mandaly*, 2 M.L.T. 55. So also, a stipulation in a lease granted by Government of land situated in Malabar that the lessee should not erect buildings thereon would be valid under this section, notwithstanding anything contained in sec. 19 of the Malabar Compensation for Tenants' Improvements Act—*Moosakutti v. Secretary of State*, 43 Mad. 65. Similarly, the provision of the Malabar Compensation for Tenants' Improvements Act as to the eviction of the tenant on payment of compensation to him for improvements does not apply to Crown grants which do not provide accordingly—*Ullatuthodi v. Secretary of State*, 41 M.L.J. 494.

APPENDIX V.

SECS. 17, 48 AND 49, INDIAN REGISTRATION ACT, 1908.

(As amended by Act XXI of 1929.)

17. (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

Documents of which registration is compulsory,

- (a) instruments of gift of immoveable property;
- (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property;
- (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;
- (d) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent; and
- (e) *non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property:*

Provided that the Local Government may, by order published in the local official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

- (2) Nothing in clauses (b) and (c) of sub-section (1) applies to—
- (i) any composition deed; or
 - (ii) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consists in whole or in part of immoveable property; or
 - (iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immoveable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its

- immoveable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or
- (iv) any endorsement upon or transfer of any debenture issued by any such Company; or
 - (v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or
 - (vi) any decree or order of a Court *except a decree or order expressed to be made on a compromise and comprising immoveable property other than that which is the subject-matter of the suit or proceeding*; or
 - (vii) any grant of immoveable property by Government; or
 - (viii) any instrument of partition made by a Revenue officer; or
 - (ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or
 - (x) any order granting a loan under the Agriculturists Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or
 - (xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or
 - (xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-officer.

Explanation.—A document purporting or operating to effect a contract for the sale of immoveable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.

(3) Authorities to adopt a son, executed after the first day of January 1872 and not conferred by a will, shall also be registered.

This section has been amended by the T. P. Amendment Supplementary Act, XXI of 1929 for the following reasons:—

“It has been held by the High Court of Bombay that an assignment of a mortgage-deed for Rs. 100 or upwards requires registration under section 17, subsection (1), clause (b), of the Indian Registration Act. The reason given is that an assignment gives the assignee the right to sell immoveable property covered by the decree, and the right to sell an immoveable property is a right or interest in such property (1 Bom. 167; See also 11 Bom.L.R. 356). On the other hand, it has been held by the High Courts of Calcutta and Allahabad that such an assignment does not require registration, the reason being that the assignment is not of any immoveable property, but of the decree itself, and the decree, though it be upon a mortgage-deed, can in no sense be regarded as immoveable property. Further, it has been said by these Courts that the assignment does not *by itself create* an interest in immoveable property (23 Cal. 450; 6 C.W.N. 5; 12 C.W.N. 625; 13 All. 89, 91; 35 All. 524).

“We do not think that there is any warrant for construing the words ‘which

purport or operate to create' in clause (b) of the section in the sense 'which in themselves purport or operate to create.' We think that the correct view is the one that is taken by the High Court of Bombay, and to give effect to that view we have inserted clause (e) in section 17, sub-section (1).

"Section 17, sub-section (2), clause (vi), provides that nothing in clauses (b) and (c) of sub-section (1) shall apply to decrees or orders of Courts or to awards. It has been brought to our notice that the exemption of decrees and orders of Court from registration without any exception has given rise to great hardship, especially in the case of consent decrees relating to immoveable property. It is provided by Order XXIII, rule 3 of the Code of Civil Procedure, 1908, that where a suit has been adjusted by any lawful compromise, the Court shall order such compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit. Prior to the ruling of the Judicial Committee in 46 I.A. 240 there was a conflict of opinion whether the Court had power under Order XXIII, rule 3, to include in the decree immoveable properties which did not relate to the suit. It was held in some cases that a Court had the power to do so and that the decree, even if it included matters outside the scope of the suit, did not require registration. On the other hand, it was held in a large majority of cases that a Court had not the power to include in its decree immoveable property outside the scope of the suit, and that, even if the Court did include such property in its decree, the application for the consent decree required registration as to that part thereof which related to such property. It has now been held by the Judicial Committee in 46 I.A. 240 that the proper method of carrying out the terms of Order XXIII, rule 3, is for the decree to recite the whole of the compromise and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the compromise in a Schedule to the decree; but that in either case, although the operative part of the decree will be properly confined to the actual subject-matter of the suit, the decree taken as a whole would include the compromise. In that case their Lordships went on to say: 'Turning now to the Indian Registration Act of 1908, and considering the meaning of the word 'decree' in section 17, sub-section (2), clause (vi), this must be read in connection with the purpose of the Statute, which is to provide a method of public registration of documents, and there is, therefore, no reason why a limit should be imposed upon the meaning of the word so as to confine it to the operative portion only of the decree.' The result is that since the Privy Council ruling, it is not compulsory to register that portion of the compromise or decree which relates to immoveable properties outside the scope of the suit. This has created considerable difficulties. It is, therefore, proposed that the exemption of decrees and orders from registration should not apply to decrees and orders expressed to be made on a compromise. Non-registration of awards affecting immoveable property creates the same hardship as in the case of compromise decrees and orders. We have, therefore, altered section 17, sub-section (2), clause (vi)."—*Report of the Special Committee.*

48. All non-testamentary documents duly registered under this Act, and relating to any property, whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession and the same constitutes a valid transfer under any law for the time being in force:

Provided that a mortgage by deposit of title-deeds as defined in section 58 of the Transfer of Property Act, 1882, shall take effect against

any mortgage-deed subsequently executed and registered which relates to the same property.

"We propose to make it clear in this section that those transactions only which can validly be made by an oral agreement and by delivery of possession according to the provisions of any law for the time being in force, cannot be supplanted by subsequent transactions made by registered instruments.

"So also, a mortgage by deposit of title deeds, which is valid under section 59 of the Transfer of Property Act and will not be in writing and, therefore, will not be made by a registered instrument, will have to be excepted. It has been established that, as equitable mortgages are recognised under the Transfer of Property Act, they cannot be supplanted by a subsequent mortgage relating to the same property although the latter may be registered (I.L.R. 33 Cal. 410)."—*Report of the Special Committee.*

Effect of non-registration of documents required to be registered.

49. No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall—

- (a) affect any immoveable property comprised therein,
- (b) confer any power to adopt, or
- (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

Provided that an unregistered document affecting immoveable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.

"Section 49 enacts that a document which is required to be registered, and is not registered, cannot be received in evidence. It has been held by the Judicial Committee that such documents, although not admissible for the purpose of proving the transaction purported to have been effected by them, are admissible in evidence for collateral purposes, such as for ascertaining the nature of possession (I.L.R. 43 Mad. 244 P.C.). In giving effect to the doctrine of part performance when transactions are not complete owing to the omission of registration, it is necessary that Courts should be empowered to admit them in evidence for the purpose of proving part performance. A proviso has accordingly been added to the section."—*Report of the Special Committee.*

See also p. 243 *ante* (in Notes under sec. 53A, T. P. Act).

APPENDIX VI.

SEC. 27A, SPECIFIC RELIEF ACT, 1877.

27A. *Subject to the provisions of this Chapter, where a contract to lease immoveable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,—*

Specific performance in case of part performance of contract to lease.

- (a) *where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract; and*
- (b) *where specific performance is claimed by the lessee, he has in part performance of the contract, taken possession of the property, or being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract;*

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

This section applies to contracts to lease executed after the first day of April, 1930.

This section has been inserted into the Specific Relief Act by sec. 3 of the T. P. (Amendment) Supplementary Act, 1929 (XXI of 1929).

"For the reasons stated in the notes under the proposed sec. 53A of the Transfer of Property Act, we propose to add a section in Chapter II of the Specific Relief Act."—Report of the Special Committee.

See pp. 241-242 ante (in Notes under sec. 53A, T. P. Act).

APPENDIX VII.

HINDU DISPOSITION OF PROPERTY ACT.

Act No. XV of 1916.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Received the assent of the Governor-General on the 28th September, 1916.

An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition ; It is hereby enacted as follows:—

1. (1) This Act may be called the Hindu Disposition of Property Act, 1916.
Short title and extent.

(2) It extends, in the first instance, to the whole of British India, except the province of Madras: provided that the Governor-General in Council, may, by notification in the Gazette of India, extend this Act to the province of Madras.

Object:—“The object of the present Bill is to enable Hindus to dispose of property by transfer *inter vivos* and by will for the benefit of unborn persons within certain limits. According to the Hindu law as now administered in British India, a gift in favour of a person not in existence at the date of the gift is void, and so also a bequest in favour of a person not in existence at the time of the testator's death.

..... Every lawyer familiar with the Indian Courts must have come across a large number of settlements and wills made by Hindus and Mahomedans for the benefit of their children and grandchildren. The paramount object of the settlor in all these cases has been to provide not only for his children and grandchildren then in existence, but also for those to be born thereafter. But instead of giving effect to the settlor's intention, the law as now administered completely defeats it. Even where a donor has only one child in existence at the date of the gift and the gift is made in express terms for the benefit of all his children including those to be born hereafter, the law excludes from the benefit of the gift all children born subsequently to the date of the gift, to the entire subversion of the donor's intention. Similarly, the intention of testators to benefit by their wills their children and grandchildren not in existence at the death of the testators is also defeated. It is to remedy these evils and to give effect to the settlor's or testator's intention that the present Bill is proposed. The sole object of the Bill is to enable the Courts to carry out the settlor's or testator's intention, which under the present state of law they are precluded from doing. At the same time it is recognised that this can only be done within certain limits, and these limits are prescribed by section 3.”—*Statement of Objects and Reasons.*

Extent and application:—The province of Madras has been exempted from the operation of this Act, because a similar provision has already been made in that province by the Hindu Transfers and Bequests Act (Madras Act I of 1914). See that Act in the next Appendix.

This Act, unlike the Madras Act, has no retrospective effect; it does not therefore apply to gifts and wills executed prior to its coming into force.

2. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit they have been made was not in existence at the date of such disposition.

Disposition for the benefit of persons not in existence.

Dispositions to unborn persons:—This section has the effect of abrogating the following cases, in so far as they lay down that there can be no gift or will in favour of an unborn person:—

Tagore v. Tagore, 9 B.L.R. 377 (P.C.), 18 W.R. 359; *Mangaldas v. Krishnabai*, 6 Bom. 38; *Karsandas v. Laddkavahu*, 12 Bom. 185 (198); *Javerbai v. Kablibai*, 15 Bom. 326; *Kherodemoney v. Doorgamoney*, 4 Cal. 455; *Alangamanjari v. Sonamoni*, 8 Cal. 637; *Bai Motivahu v. Bai Mamubai*, 21 Bom. 709 (P.C.); *Bhagabati Barmanya v. Kali Charan*, 32 Cal. 992 and 38 Cal. 468 (P.C.); *Ram Lal v. Kanai Lal*, 12 Cal. 663; *Krishtoromoni v. Narendra*, 16 Cal. 383 (P.C.); *Bai Mamubai v. Dossa Morarji*, 15 Bom. 443; *Khimji v. Morarji*, 22 Bom. 533.

A similar enactment has been made in section 3 of the Madras Act I of 1914 (Hindu Transfers and Bequests Act).

"Subject to limitations":—It should be noted that this Act does not validate any and every disposition made in favour of an unborn person. It validates only those dispositions in favour of unborn persons which are made under the circumstances mentioned in chapter II of the T. P. Act, and sections 113 to 116 of the Indian Succession Act, 1925. See the next section.

Limitations and conditions.

3. The limitations and provisions referred to in section 2 shall be the following, namely—

- (a) in respect of dispositions by transfer *inter vivos*, those contained in Chapter II of the Transfer of Property Act, 1882, and
- (b) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

The words "Chapter II" in clause (a) have been substituted for "sections 13, 14 and 20"; and in clause (b) the figures "113, 114, 115 and 116" have been substituted for "100 and 101," owing to the change in the numbering of sections in the Indian Succession Act, 1925. These amendments have been made by sec. 12 of the T. P. Amendment Supplementary Act (XXI of 1929).

4. * * *

This section has been omitted by sec. 12 of the T. P. Amendment Supplementary Act (XXI of 1929).

5. Where the Governor-General is of opinion that the Khoja Community in British India or in any part thereof desire that the provisions of this Act should be extended to such community, he may, by notification in the Gazette of India, declare that the provisions of this Act with the substitution of the word "Khojas" or "Khoja"

Application of the Act to the Khoja community.

as the case may be for the word "Hindus" or "Hindu" wherever those words occur, shall apply to that community in such area as may be specified in the notification, and this Act shall thereupon have effect accordingly.

This Act, when originally drafted, was intended to be made applicable to Hindus and *Mahomedans* alike, but in view of considerable difference of opinion among the Mahomedan members of the Council, the provisions as regards the Mahomedans were left out of the enactment by the Select Committee. But the Khojas have been included in the Act, for though they are Mahomedans in religion, they are guided by the rules of Hindu law in matters of inheritance, succession and wills.

APPENDIX VIII.

HINDU TRANSFERS AND BEQUESTS ACT.

Madras Act No. I of 1914.

PASSED BY THE GOVERNOR OF FORT ST. GEORGE IN COUNCIL.

*Received the assent of the Governor on the 14th February, 1914,
and of the Governor-General on the 14th March, 1914.*

*An Act to declare the rights of the Hindus to make transfers
and bequests in favour of unborn persons.*

WHEREAS it is expedient to declare the rights of persons governed by the Hindu Law to make transfers and bequests in favour of unborn persons; It is hereby enacted as follows:—

1. This Act may be called "the Hindu Transfers and Bequests Act,
Short title. 1914."

2. (1) This Act shall apply to all transfers *inter vivos* and wills
Application and extent. made by persons governed by the Hindu law who
are domiciled within the limits of the Presidency
of Madras.

(2) In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date:

Provided that nothing contained in this Section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of the Act.

Explanation.—Hindus governed by the Marumakkattayam or the Aliyasantana law shall be deemed to be persons governed by Hindu law for the purposes of this Act.

Unlike the Hindu Disposition of Property Act, this Act has retrospective effect; it validates dispositions in favour of unborn persons which have been made before the date of the Act and are intended to take effect after such date—*Muthuswami v. Kalyani*, 40 Mad. 818. Thus, a testator by his will provided that after his death his wife N should enjoy the property till her death, and then the property would go to the testator's daughter's sons, "who are already born (at the time of the will) and who may be born hereafter." The testator died in 1906; the widow N was living even after the date of this Act. The bequest in favour of the unborn sons

of the testator's daughter which is to come into effect after the widow's death would consequently come into effect after the date of passing of this Act, and is therefore valid—*Kudappa Venkayamma v. Kukatia Narasimma*, 31 M.L.J. 33; *Shanmuga v. Shanmuga*, 53 Ind. Cas. 203. But where the bequest in favour of unborn persons was to take effect immediately on the testator's death and he died long before the passing of this Act, *held* that this Act would not apply, since the retrospective operation of this Act is limited to such dispositions as are intended to come into operation at a time which is subsequent to the passing of this Act—*Varadaraja v. Narayana-swami*, 27 M.L.J. 681.

3. *Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer inter vivos or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.*

Disposition for the benefit of person not in existence.

4. *The limitations and provisions referred to in section 3 shall be the following, namely:—*

(a) *in respect of dispositions by transfers inter vivos, those contained in Chapter II of the Transfer of Property Act, 1882, and*

(b) *in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.*

Limitations and conditions.

*Amendment:—*The old sections 3 to 5 have been replaced by the new sections 3 and 4, by sec. 11 of the T. P. Amendment Supplementary Act (XXI of 1929). These two sections may be compared word for word with sections 2 and 3 of the Hindu Disposition of Property Act (XV of 1916).

APPENDIX IX.

THE HINDU TRANSFERS AND BEQUESTS (CITY OF MADRAS) ACT, 1921.

Madras Act VIII of 1921.

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the city of Madras.

WHEREAS it is expedient to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras; It is hereby enacted as follows:—

1. This Act may be called the Hindu Transfers and Bequests (City of Madras) Act, 1921.

Short title.

2. (1) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Ordinary Original Civil Jurisdiction of the High Court of Madras.

Application and extent.

(2) In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to the 14th February, 1914:

Provided that nothing in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of this Act.

Explanation:—Hindus governed by the Marumakkattayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

Disposition for the benefit of person not in existence.

Limitations and conditions.

4. The limitations and provisions referred to in section 3 shall be the following namely:—

(a) in respect of dispositions by transfer *inter vivos*, those contained in Chapter II of the Transfer of Property Act, 1882, and

(b) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

Amendment:—The old sections 3 to 5 have been replaced by the new sections 3 and 4 by sec. 13 of the T. P. Amendment Supplementary Act (XXI of 1929). Compare the amendments made in sections 3 and 4 of the Hindu Transfers and Bequests Act in the preceding Appendix.

APPENDIX X.

FORMS OF DEEDS OF TRANSFER.

1. AGREEMENT FOR SALE.

AN AGREEMENT made the 1st day of June, 1920, between AB son of..... resident of.....(hereinafter called the VENDOR) of the one part, and CD son of.....resident of.....(hereinafter called the PURCHASER) of the other part. The said AB will sell and the said CD will purchase absolutely free from all incumbrances all that three-storied brick-built messuage, tenements and hereditaments or dwelling-house described in the schedule annexed hereto, for the price of Rs. 20,000, of which Rs. 2,000 shall be paid immediately on the execution of these presents, and the residue Rs. 18,000 on the 1st day of August next at the residence of the Vendor when the purchase shall be completed. The Vendor shall within 15 days from the date hereof deliver to the Purchaser an abstract of his title to the premises. Upon payment of the said sum of Rs. 18,000 at the residence of the Vendor, he will execute a proper assurance of the premises to the Purchaser, such assurance to be prepared by and at the expense of the Purchaser and to be left by him at the residence of the Vendor not less than 7 days before the said 1st day of August, 1920.

The possession will be retained by the Vendor down to the said 1st day of August, and as from that day all outgoing shall be discharged and possession taken by the Purchaser, and such outgoing shall if necessary, be apportioned between the Vendor and the Purchaser. If from any cause whatsoever the purchase shall not be completed on the said 1st day of August next, the Purchaser shall pay interest at the rate of nine per cent. per annum on the unpaid purchase-money from that day until the completion of the purchase. No error, misstatement or omission in the description of the property shall annul the sale, but compensation shall be allowed or given as the case may require and shall be settled by two arbitrators, and the decision of such arbitrators, or their umpire if they disagree, shall be final.

IN WITNESS whereof the parties above-named have set and subscribed their respective hands and seals the day and year first above written.

2. AGREEMENT FOR SALE (Another Form).

ARTICLES OF AGREEMENT made this 30th day of June one thousand nine hundred and twenty-two, between AB, son of.....resident of.....(hereinafter called the VENDOR) of the one part, and CD, son of.....resident of.....(hereinafter called the PURCHASER) of the other part. IT IS HEREBY AGREED between the parties hereto as follows:—

1. The Vendor shall sell and the Purchaser shall purchase all that two-storied brick-built messuage, tenement, hereditaments or dwelling-house described in the schedule annexed hereto, with all appurtenances, rights and privileges belonging thereto free from all incumbrances whatever at or for the value of Rupees.....to be paid as follows, that is to say, the sum of Rs.....as earnest money immediately after the signing of this agreement and the residue thereof at the completion of the purchase.

2. The purchase shall be completed on the 31st day of July, 1922 at the office of the Vendor's pleader, Mr.....and the Purchaser shall then have possession of the said premises, all outgoing up to that time being cleared by the Vendor. If

from any cause whatsoever the purchase shall not be completed on the 31st day of July next, the Purchaser shall pay to the Vendor interest on the residue of the purchase-money at the rate of six per cent. per annum from the day until the completion of the purchase.

3. The Vendor shall on or before the.....day of.....deliver to the Purchaser or his solicitor an abstract of title of the said premises.

4. The production and inspection of all deeds and other documents not in the possession of the Vendor, and the procuring and making of all certificates, attested, official or other copies of or extracts from, any records, registers, deeds, will, or other documents, and of all declarations and other evidence whatsoever which may be required by the Purchaser for the purpose of verifying the abstract or for any other purpose, shall be at the expense of the Purchaser, who shall also bear the expense of all searches, inquiries and journeys which may be required for the above purposes, or any of them.

5. Upon payment of the purchase-money at the time and in manner aforesaid, the Vendor shall make and execute to the purchaser a proper assurance of the premises, such assurance to be prepared by and at the expense of the Purchaser, and to be left by him not less than seven days before the said.....day of.....at the office aforesaid for execution by Vendor.

6. Such of the muniments of title as relate to the other properties of the Vendor as well as to the premises hereby agreed to be sold, shall be retained by him and he shall enter into the usual covenant with the Purchaser for production and furnishing copies of the same, the deed containing such covenant to be prepared by and at the expense of the purchaser.

7. The premises are believed to be correctly described in the schedule hereto, but if any error or mis-statement shall be found in the said schedule, the same shall not annul the sale but compensation shall be given or allowed as the case may require, such compensation to be ascertained by two indifferent persons, and in case of their disagreement, by their umpire, and if either party shall fail to appoint a referee for the space of ten days after notice shall have been given to him by the other party so to do, the referee appointed by the other party may make a final decision alone.

IN WITNESS WHEREOF the parties above named have set and subscribed their respective hands and seals the day and year first above written.

3. AGREEMENT FOR SALE OF LEASEHOLD PROPERTY.

AN AGREEMENT made the 1st day of July one thousand nine hundred and twenty one, between AB, son of.....resident of.....(hereinafter called the Vendor) of the one part, and CD, son of....., resident of.....(hereinafter called the Purchaser) of the other part.

The said AB agrees to sell and the said CD agrees to purchase all that two-storied brick-built messuage or dwelling-house, described in the schedule hereto annexed, held by lease dated the.....day of....., for the unexpired residue of a term of.....years computed from the day of.....subject to the yearly rent of Rs....., and to the covenants and conditions contained in the lease, and on the lessee's part to be observed and performed, at the price of Rs....., to be paid as follows, that is to say, the sum of Rs.....as earnest-money immediately upon the signing of this agreement, and the residue thereof at the completion of the purchase.

The purchase shall be completed on the.....day of.....at the office of Mr.....the Vendor's solicitor, and the Purchaser shall then have

possession of the said premises, all out-goings up to that time being cleared by the Vendor. If the purchase shall not be completed on the.....day of.....next, the Purchaser shall pay to the Vendor interest on the purchase-money at the rate of nine per cent. per annum from that day until the completion of the purchase.

In witness whereof, etc.

4. CONVEYANCE.

THIS INDENTURE made this second day of June one thousand nine hundred and twenty, between AB, son of.....resident of.....in the district of..... (hereinafter called the VENDOR) of the one part, and CD, son of.....resident of.....in the district of..... (hereinafter called the PURCHASER) of the other part. WHEREAS the said AB hath agreed with the said CD for the absolute sale to him of the premises, lands and hereditaments described in the schedule annexed hereto at or for the price of Rs..... NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of Rs..... to the said AB paid by the said CD (the receipt of which the said AB hereby acknowledges) the said vendor doth hereby convey, transfer, and assign unto the said purchaser, his heirs, executors, administrators and assigns ALL THAT brick-built messuage, tenements, hereditaments or dwelling-house being No.....street in the town of Calcutta and described in the schedule hereto AND ALL THE RIGHT, title, interest, property, claim and demand whatsoever of the vendor in to or upon the said premises and every part thereof: TO HAVE AND TO HOLD the premises hereby conveyed unto and to the use of the purchaser, his heirs, executors, administrators and assigns absolutely; AND THE VENDOR doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the purchaser, his heirs, executors, representatives and assigns, that he the vendor now hath good right to convey the said premises hereby conveyed or expressed so to be, unto the purchaser, his executors, administrators, representatives and assigns in manner aforesaid, AND THAT THE PURCHASER shall hereafter peaceably hold, use and enjoy the same as his own chattels and property without any hindrance, interruption, claim or demand, by or from him the vendor or any other person whomsoever: AND THAT THE VENDOR and all persons claiming under him, shall and will, from time to time, upon the request and at the cost of the purchaser, his heirs, executors, representatives and assigns, do and execute or cause to be done and executed all such act, deeds and things whatsoever for further and more perfectly assuring the said premises and every part thereof unto the purchaser, his heirs, executors, representatives and assigns and placing him and them in possession of the same according to the true intent and meaning of these presents, as shall or may be reasonably required.

In witness whereof etc.

5. SIMPLE MORTGAGE.

THIS INDENTURE made the 5th day of June, 1921 between AB of..... (hereinafter called the Mortgagor) of the one part, and CD of..... (hereinafter called the Mortgagee) of the other part, WITNESSETH that in consideration of the sum of rupees ten thousand this day paid to the said AB by the said CD (the receipt whereof the said AB doth hereby acknowledge) the Mortgagor will on the 5th day of June, 1929, pay to the Mortgagee the sum of rupees ten thousand with interest for the same in the meantime at the rate of ten per cent. per annum, and if the said sum or any part thereof shall remain unpaid after the said 5th day of

June, 1929, will thenceforth pay to the mortgagee interest for the same or so much thereof as shall for the time being remain unpaid at the rate of twelve per cent. per annum.

AND AS A SECURITY for the said consideration of Rupees ten thousand, the Mortgagor hereby mortgages unto the Mortgagee all that three-storied brick-built messuage or dwelling-house together with the piece or parcel of land containing by estimation.....cottahs.....chittacks, be the same a little more or less, being premises No. Road in the town of and bounded on the north by etc. (*here give boundaries*) AND IT IS HEREBY AGREED and declared that if the said sum of Rupees ten thousand with interest thereon shall not be paid on the 5th day of June, 1929, according to the foregoing covenant, it shall be lawful for the Mortgagee, his executors, administrators, representatives or assigns, at any time or times to sell the said messuage and premises and with and out of the moneys to arise from any such sale as aforesaid, in the first place pay and retain the costs and expenses attending such sale or otherwise incurred in relation to this security, and in the next place pay and satisfy the moneys which shall then be owing upon this security and shall then pay the surplus (if any) to the Mortgagor, and should the sale not realise the sum due on the mortgage, the Mortgagor hereby covenants with the Mortgagee that he the Mortgagor will pay to the Mortgagee any sum found or remaining due over and above the amount realised by the sale.

IN WITNESS WHEREOF the said Mortgagor and Mortgagee have hereunto set and subscribed their hands and seals the day and year first above written.

6. SIMPLE MORTGAGE (Usual Indian Form).

I, A. B. Chatterjee son of C. D. Chatterjee, by caste Brahmin, by occupation landholder, of village.....thana.....District.....do hereby covenant and declare as follows:—That being urgently in need of money to defray the expenses of my daughter's marriage, I have this day the 1st of July, 1921, borrowed from you Babu M. N. Banerjee, (son of etc.) the sum of rupees three thousand, for which I agree to pay interest at the rate of nine per cent. per annum. And I agree to pay the said sum of rupees three thousand with interest at the aforesaid rate on or before the 30th June, 1926. As security for the loan, I do hereby mortgage the whole of my ancestral house situate in the village of.....thana.....District.....and specifically described in the schedule hereto annexed; and I further declare that should I fail to pay the said sum of rupees three thousand with interest at the aforesaid rate of nine per cent. per annum within the said 30th day of June, 1926, I authorise you, the Mortgagee, to cause the said property hereby mortgaged to be sold with a view to satisfy your claim, and should your claim be not then satisfied you will be authorised to recover the balance from my person and other property. I also agree not to alienate the said mortgaged property or to cause its deterioration, and declare that if I break any of the covenants of this deed, you will be entitled to recover at once the mortgage-money without waiting for the expiry of the term. Any sum paid by me either towards interest or towards principal shall be duly endorsed in my own hand on this deed, or I shall take a receipt therefor, and in the absence of a receipt or endorsement I shall not claim nor be entitled to any deduction on account of repayment which I might set up.

These covenants shall not only bind me but my heirs, executors, representatives and assigns as well. I have duly and deliberately executed this deed, and put my signature hereto.

(Witnesses' Signatures.)

(Signature of Mortgagor).

7. ENGLISH MORTGAGE.

THIS INDENTURE made this 1st day of January, 1922, between AB, residing at.....(hereinafter called the Mortgagor) of the one part, and CD residing at.....(hereinafter called the Mortgagee) of the other part, WITNESSETH that in consideration of the sum of Rupees ten thousand this day paid to the said AB by the said CD, (the receipt whereof the said AB doth hereby acknowledge) the said AB doth hereby for himself, his heirs, representatives and assigns, grant, convey and confirm unto the said CD all that two-storied brick-built messuage, tenement and dwelling-house (*here give description*) AND THE SAID MORTGAGOR for himself, his heirs, representatives and assigns hereby covenants with the said Mortgagee, his heirs, representatives and assigns, that the said Mortgagor has a good, perfect and clear title to the said properties free from all charges, incumbrances, attachments, liens whatsoever AND THE SAID MORTGAGEE shall have full power to enter upon and quietly enjoy the said properties after default of payment of the amount hereby secured within the time hereinafter provided in that behalf indemnified by the said Mortgagor, his heirs, representatives and assigns against all manner of claims, demands and actions by whatsoever person made, advanced or instituted, AND ALSO THE SAID MORTGAGOR, his heirs, representatives and assigns shall at the request of the said Mortgagee, his heirs, representatives and assigns do all such acts and execute all such documents as may be necessary to more perfectly assure the said premises according to the meaning of these presents to the said Mortgagee, his heirs, representatives and assigns, AND THE SAID MORTGAGOR hereby also covenants and agrees with the said Mortgagee, his heirs, representatives and assigns that he on the 31st day of December, 1925 will truly pay to the said Mortgagee, his heirs, representatives and assigns, the said sum of Rupees ten thousand with interest thereon at the rate of twelve per cent. per annum to be paid quarterly until the said 31st day of December, 1925, or until the payment in full of the said mortgage-money; AND ALSO during the continuance of the said presents, the said Mortgagor, his heirs, representatives and assigns shall have no power to charge, encumber, alien or otherwise dispose of the said premises; AND THAT THE SAID MORTGAGEE for himself, his heirs, representatives and assigns hereby covenants with the said Mortgagor, his heirs, representatives and assigns that upon repayment to him or his heirs, representatives and assigns of the said sum of Rupees ten thousand with the interest to be calculated and paid in manner hereinbefore provided within the time hereinbefore limited the said Mortgagee, his heirs, representatives and assigns shall at the request and cost of the said Mortgagor, his heirs, representatives and assigns reconvey and reassure unto him or them, as he or they shall direct, the said premises.

8. ENGLISH MORTGAGE (Another Form).

THIS INDENTURE made the..... day of.....between A.B. resident of.....(hereinafter called the Mortgagor) of the one part, and C.D. resident of.....(hereinafter called the Mortgagee) of the other part, WITNESSETH that in consideration of the sum of Rupees.....this day paid to the said A.B. by the said C.D. (the receipt whereof the said A.B. hereby acknowledges) the said Mortgagor hereby covenants to pay to the Mortgagee on the.....day of..... next the sum of Rupees.....with interest thereon in the meantime at the rate of twelve per cent. per annum, computed from the date of these presents, and also so long after that date as any principal money remains due under these presents, to pay to him interest thereon at the same rate by equal half-yearly payments on

the 30th day of June and 31st day of December; AND this indenture also witnesseth that for the consideration aforesaid the said Mortgagor hereby conveys unto the said Mortgagee all that two-storied brick-built messuage, tenement and dwelling-house together with the piece or parcel of land containing by estimation.....cottahschittaks, be the same a little more or less, being premises no.....street in the town of Calcutta and butted and bounded on the north by etc. (*here give boundaries*); TO HOLD the same unto and to the use of the said Mortgagee in fee simple: PROVIDED always that upon payment by the said Mortgagor of the aforesaid sum of Rs.....with interest thereon on the.....day of.....next according to the foregoing covenant in that behalf, the said Mortgagee, his heirs, representatives and assigns shall at the request and cost of the said Mortgagor, his heirs, representatives and assigns reconvey unto him or them, as he or they shall direct, the said premises.

In witness whereof etc.

9. MORTGAGE BY CONDITIONAL SALE.

THIS INDENTURE by way of MORTGAGE BY CONDITIONAL SALE made this second day of June one thousand nine hundred and twenty two, between AB. son of.....resident of.....(hereinafter called the Mortgagor) of the one part, and CD son of.....resident of.....(hereinafter called the Mortgagee) of the other part: WHEREAS the said CD at the request of the said AB has agreed to lend him the sum of Rs.....on having the repayment thereof together with interest thereon secured in manner hereinafter appearing, NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of Rs.....now paid by the said CD to the said AB (the receipt whereof the said Mortgagor doth hereby acknowledge), the said AB as Mortgagor hereby conveys and assigns by way of mortgage by conditional sale all that three-storied brick-built messuage or dwelling house specifically described in the schedule annexed hereto, TO HOLD unto and to the use of the said Mortgagee from this day, the said Mortgagee getting possession of the mortgaged property; PROVIDED always and it is hereby declared that if the said sum of Rs.....with interest thereon from the date hereof at the rate of 12 per cent. per annum after deducting the proceeds of the mortgaged property, (an account whereof the said Mortgagee hereby doth promise to keep) shall be paid to the said CD on the.....day of.....next, the said premises shall at the request and cost of the said AB, his heirs executors or assigns, be reconveyed to him or them: AND THE SAID AB hereby covenants with the said CD to pay to him on the.....day of.....next the sum of Rs.....with interest thereon from the date hereof at the rate aforesaid, and if and so long as the said principal sum or any part thereof shall remain unpaid, to pay interest thereon or on so much thereof as shall for the time being be owing at the rate aforesaid by equal half-yearly payments on the 30th day of June, and the 31st day of December: AND IT IS HEREBY DECLARED that the Mortgagee would not do any act in respect of the property in his possession by which its value may be diminished: AND ALSO that the said AB doth undertake to pay the Government revenue and cesses, in respect of the said property, and in case he fails to make such payment the said Mortgagee would pay such revenue and cesses and all sums so paid by the Mortgagee shall carry interest at the rate aforesaid or form a charge on the said property in the same manner as the said sum of Rs.....

In witness whereof, etc.

10. EQUITABLE MORTGAGE.

On demand I promise to pay CD, son of.....residing at.....the sum of Rupees two thousand with interest at the rate of 9 per cent per annum for value received in cash. And as collateral security for the payment of the above named sum, I hereby deposit with CD the following documents of title (*here mention the documents*).

Dated the.....19 ..

(Signature.)

11. EQUITABLE MORTGAGE (Another Form).

MEMORANDUM that on this the 15th day of June, 1922, AB, residing athas deposited with CD, residing at.....by way of equitable mortgage the title-deeds comprised in the schedule hereto relating to certain premises belonging to the said AB and situate in the town of Burdwan, for securing the repayment to the said CD of the sum of Rupees two thousand this day advanced by the said CD to the said AB with interest for the same from this day at the rate of 9 per cent. per annum.

In witness whereof etc.

12. LEASE OF HOUSE.

THIS INDENTURE made this.....day of.....19...., between AB (hereinafter called the LESSOR) of the one part, and CD (hereinafter called the LESSEE) of the other part: Whereby the lessor agrees to let and the lessee agrees to take all that brick-built messuage, tenement or dwelling-house and all other appurtenances and all rights, easements and privileges belonging thereto situate at.....street within the town of Calcutta on a yearly tenancy from the.....day of19....at the monthly rental of Rs.....only, the rent of each month being payable on or before the second day of each and every succeeding month: And the lessee hereby agrees with the lessor as follows:

That the lessee will pay the said rent at the time and in the manner aforesaid and will also pay all rates, taxes, and assessments charged on the said premises during the tenancy; that the lessee shall keep the premises in good and substantial repair during the said term, and shall use and occupy the said house and premises in a fair and tenantable manner and shall deliver up to the lessor at the expiration of the term: AND the lessee will further permit the lessor or his agent to enter the said premises at convenient hours in the daytime and to view and examine the condition thereof and if any decays, defects and want of reparation shall be then and there found, the lessor shall give the lessee notice in writing to repair and amend the same within two calendar months then next following, within which time the lessee shall repair and amend the same accordingly; and also the lessee shall not carry on or permit to be carried on any trade or business upon the said premises, or permit the same to be occupied or used in any manner other than as a private dwelling-house: AND further that the lessee shall not assign his interest in the said premises under these presents nor underlet or part with the possession of the same or any part thereof to any person whomsoever without the consent in writing of the landlord.

PROVIDED always and it is hereby declared that if the said monthly rent of Rs.....or any part thereof shall be in arrear for the space of twentyeight days next after any of the days whereupon the same ought to be paid as aforesaid, whether the same shall or shall not have been legally demanded, or if there shall be any breach or non-observance of the lessee's covenants hereinbefore contained, then

and in any of the said cases it shall be lawful for the lessor at any time thereafter to re-enter into or upon the said demised premises, and to have again, repossess, and enjoy as in his former estate: AND the lessor hereby covenants with the lessee that the lessee paying the rent hereby reserved, and observing and performing the covenants and conditions herein contained and on his part to be observed and performed shall and may peaceably and quietly possess and enjoy the said premises hereby demised during the said term without any lawful interruption from or by the lessor or any person rightfully claiming from or under him.

IN WITNESS WHEREOF the parties to these presents have hereunto set and subscribed their respective hands and seals the day, month, and year first above written.

13. NOTICE TO QUIT (By Landlord).

To C. D. (Tenant).

DEAR SIR,

You are hereby required to quit and deliver up on the 30th day of September, 1922, the possession of the premises No.....Street, Calcutta, which you now hold of me as tenant. Dated the 10th day of September, 1922.

A. B.
(Landlord).

14. DITTO (By Landlord's Agent).

To.....(Tenant.)

DEAR SIR,

I, the manager of the estate of Raja.....your landlord, and as agent on his behalf and under instructions from him, hereby give you notice to quit and deliver up possession to him of premises No.....Street, in the town of Calcutta which you hold from him as tenant, on the expiry of the 30th day of June, 1922.

Yours faithfully,

.....

15. DITTO (By Landlord's Pleader).

To.....(Tenant).

DEAR SIR,

Under instructions from my client A. B. of....., I hereby do give you notice that you are to quit and vacate the premises described below and of which you are now in possession immediately after the 31st day of July, 1922, and that on and from the 1st day of August, 1922, the lease heretofore subsisting shall cease and determine, and all relations of landlord and tenant as between you and my client shall also absolutely cease, and you are to deliver up possession of the said premises to my said client, and on your failure to do so, your wrongful occupation of the said premises shall be that of a trespasser and for such wrongful occupation you shall be charged at the rate of Rs.....per diem for so long as you remain in such occupation until you are ousted in due course of law.

Yours faithfully,
(Signature of Pleader).

16. NOTICE BY TENANT TO DETERMINE LEASE.

To.....(Landlord).

DEAR SIR,

I do hereby give you notice that in pursuance of the power and authority for this purpose reserved to me by the indenture of lease, dated the.....day of..... and made between you of the one part, and myself of the other part, it is my intention to determine the said indenture of lease on the.....day of.....and I shall therefore quit and deliver up to you the possession of the premises comprised in the said indenture on the said.....day of.....

A. B.
(Tenant).

17. EXCHANGE.

THIS INDENTURE made the 10th day of August, 1921, between A. B. ofof the one part, and C. D. of.....of the other part. WHEREAS the said A.B. being proprietor of the property comprised in the first schedule hereto annexed and the said C.D. being the proprietor of the property comprised in the second schedule hereto annexed, have agreed to exchange the same: NOW THIS INDENTURE WITNESSETH that in pursuance of the aforesaid agreement the said A.B. does hereby convey to the said C.D. the house and premises comprised in the first schedule, and the said C.D. hereby conveys unto the said A.B. the hereditaments comprised in the second schedule. And it is further hereby declared that each party has a good and rightful power and absolute authority to give grant convey and dispose of the property conveyed by him by these presents. In witness whereof the parties hereto have hereunto set their respective hands and seals the day and year first above written.

18. GIFT.

THIS INDENTURE made this.....day of.....between A. B. of..... (hereinafter called the Donor) of the one part, and C. D. son of..... (hereinafter called the Donee) of the other part. WHEREAS the said Donor is seised and possessed of the messuage, lands, tenements, hereditaments and premises hereinafter fully mentioned and described, the value of which will be Rupees Ten Thousand only, and whereas the said Donee is the son of the brother of the said Donor and as such nephew the said Donor has a great love and affection for the said Donee and is desirous, out of such love and affection, of disposing of the said messuage, tenements, lands, hereditaments and premises in the manner hereinafter appearing, now THIS INDENTURE WITNESSETH that in pursuance of the said intention and in consideration of love and affection which the said Donor has for the said Donee, the said Donor out of his own free will and pleasure and in full possession of his senses doth hereby give, convey, grant, transfer and confirm unto the said Donee all that two-storied brick-built messuage, tenements or dwelling-house (*here give description*) containing by estimation.....cottahschittacks, be the same a little more or less, together with all out-offices erections, buildings, and all privileges, profits, advantages and all other appurtenances whatsoever to the said messuage, tenements,

lands, hereditaments and premises: TO HAVE AND TO HOLD the said messuage, tenements, lands, hereditaments or premises hereby granted, conveyed and transferred unto and to the use of the said Donee for ever; AND THE SAID DONOR doth hereby covenant with the said Donee that notwithstanding any act, deed, matter or thing by the said Donor done, executed or knowingly committed or suffered to the contrary, he the said Donor now hath in himself good rightful power and absolute authority to give, grant, convey and dispose of the said messuage, tenements, lands hereditaments and premises in manner aforesaid: AND THAT THE SAID DONEE shall and may from time to time and at all times hereafter peaceably and quietly enter upon, have, hold, occupy, possess and enjoy the said messuage, lands, tenements and hereditaments and premises hereby conveyed with the appurtenances, and receive and take the rents, issues and profits thereof and of every part thereof, without any lawsuit, trouble, eviction, interruption, claim whatsoever from or by the said Donor or by any person or persons claiming from under or in trust for him: AND FURTHER the said Donor shall and will, from time to time and at all times hereafter, upon the request of the said Donee, make, do, acknowledge, execute or perfect or cause to be made, done, executed, or perfected all such further and other acts, deed, conveyance and assurances for more effectually and satisfactorily granting and confirming the said hereditaments, lands and premises to the term, intent and meaning of these presents as by the said Donee shall be reasonably required.

IN WITNESS WHEREOF the said Donor hath hereunto set and subscribed his hand and seal, the day, month and year first above written.

Signed, sealed and delivered

in the presence of

1.....

2.....

Witnesses.

Signature of Donor.

19. ASSIGNMENT OF ACTIONABLE CLAIM.

THIS INDENTURE made the 10th day of June, 1921, between A.B. of..... of the one part, and C.D. of.....of the other part, WITNESSETH that for the consideration of the sum of Rupees.....to the said A.B. this day paid by the said C.D. (the receipt whereof the said A.B. doth hereby acknowledge) he the said A.B. doth hereby assign unto the said C.D. his executors, administrators and assigns, all that policy of assurance on the life of him the said A.B. granted by the.....Life Insurance Company dated the.....day of.....numbered.....for the sum of Rupees.....and under the annual premium of Rupees.....and all money assured or to become payable by or under the said policy and the full benefit thereof, with power to give an effectual discharge for all moneys so assured or to become payable. And the said A.B. doth hereby covenant with the said C.D. that he the said A.B. shall not do or knowingly suffer anything to be done whereby the said policy may be rendered void or voidable or the said C.D. or his executors, administrators or assigns may be prevented from receiving the said sum of Rupees.....or any bonus thereto or any part thereof respectively.

It witness whereof, etc.

20. NOTICE OF ASSIGNMENT OF BOND (By the Assignor).

To M. N. (*the debtor*).

I, the undersigned A.B. (*the assignor*) do hereby give you notice that by a certain instrument in writing bearing date and made between me and C.D., I the said A.B. have for a valuable consideration sold and assigned to the said C.D. the bond executed by your hand bearing date.....whereby you became bound to me in the sum of Rs.....together with all arrears of interest thereon due and payable. And I give you further notice and require you henceforth to pay the said sum or sums unto the said C.D., his heirs, executors, administrators or assigns, for his and their own use and benefit.

Dated the.....day of.....

A. B. (*assignor*).

21. NOTICE OF ASSIGNMENT OF BOND (By the Assignee).

To M. N. (*the debtor*).

I, the undersigned C.D. (*assignee*) hereby give you notice that by an instrument in writing bearing date.....made between me and A.B.....a certain bond or obligation in writing under your hand and seal bearing date.....whereby you became bound unto A.B. (*the obligee*) in the sum of rupees.....has in consideration of Rs.....been assigned by the said A.B. to me: And whereas the said A.B. has refused to give you notice of the assignment, I therefore hereby give you notice to pay the said sum of Rs.....and all interest to become due upon or in respect thereof from the said.....day of.....(*the date of assignment*) to me, my executors, administrators or assigns, or as I or they shall direct.

Dated the.....day of.....

C. D. (*assignee*).

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